

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6156
Docket No. 77-6157

77-6156

BROOKHAVEN CABLE TV INC., CAPITOL CABLEVISION INC., SAMSON
CABLEVISION CORP., WARNER CABLE OF OLEAN, INC., NATIONAL CABLE
TELEVISION ASSOCIATION, INC., NEW YORK STATE CABLE TELEVISION
ASSOCIATION, & HOME BOX OFFICE, INC., & TELEPROMPTER ELECTRONICS
CORPORATION,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA & FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Plaintiffs-
Appellees,

B

-against-

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice Chairman;
MICHAEL H. PENDERGAST; ELI WAGNER; & EDWARD J. WEGMAN, Commis-
sioners of the NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Defendants-Appellants,

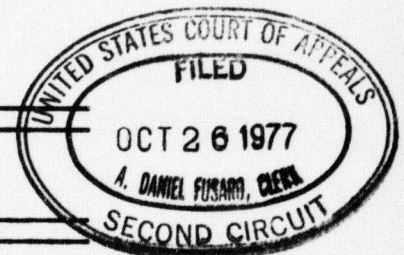
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Intervenor-Defendant-
Appellant,

CITY OF NEW YORK,

Amicus Curiae.

JOINT APPENDIX



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NOTICE OF APPEAL

1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV INC.; CAPITOL
CABLEVISION INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS,
INC.; WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIATION,
INC.; NEW YORK STATE CABLE TELEVISION
ASSOCIATION, and HCME BOX OFFICE, INC.,

Plaintiffs,

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION,

Intervenors-Plaintiffs,

- against -

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGNER; and EDWARD
J. WEGMAN, Commissioners of the NEW
YORK STATE COMMISSION ON CABLE TELE-
VISION,

Defendants,

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,

Intervenor-Defendant,

CITY OF NEW YORK,

Amicus Curiae.

NOTICE OF APPEAL

76-CV-154

Notice is hereby given that defendants hereby appeal
to the United States Court of Appeals for the Second Circuit
from the Judgment of this Court granting plaintiffs' motion for
summary judgment on the first claim in the complaint, entered
May 12, 1977.

NOTICE OF APPEAL

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DATED: Albany, New York
July 7, 1977

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By: *Kenneth J. Connolly*
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TO:

CLERK, UNITED STATES DISTRICT COURT
Northern District of New York
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NOTICE OF APPEAL

3

UNITED STATES DISTRICT COURT
— FOR THE NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV INC.;
CAPITOL CABLEVISION INC.;
SAMSON CABLEVISION CORP.;
TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIATION,
INC.; NEW YORK STATE CABLE TELEVISION
ASSOCIATION, AND HOME BOX OFFICE, INC.,

Plaintiffs

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Plaintiffs

76-CV-154

-against-

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGNER; and EDWARD J.
WEGMAN, Commissioners of the NEW YORK
STATE COMMISSION ON CABLE TELEVISION,

Defendants.

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,

Intervenor-Defendant.

CITY OF NEW YORK,

Amicus Curiae.

NOTICE OF APPEAL

Notice is hereby given that the National Association of
Regulatory Utility Commissioners hereby appeals to the United
States Court of Appeals for the Second Circuit from the order
granting plaintiffs' motion for summary judgement and denying
defendants' motion for summary judgement, entered on the twelfth
day of May, 1977.

NOTICE OF APPEAL

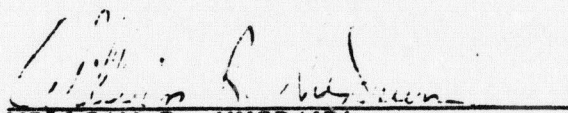
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July 7, 1977

FINAL JUDGMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----- x

BROOKHAVEN CABLE TV INC.; CAPITOL	:	
CABLEVISION INC.; SAMSON CABLEVISION	:	
CORP.; TELEPROMPTER CABLE SYSTEMS,	:	
INC.; WARNER CABLE OF OLEAN, INC.;	:	
NATIONAL CABLE TELEVISION ASSOCIATION,	:	
INC.; NEW YORK STATE CABLE TELEVISION	:	
ASSOCIATION, and HOME BOX OFFICE, INC.,	:	
Plaintiffs,	:	
UNITED STATES OF AMERICA and FEDERAL	:	
COMMUNICATIONS COMMISSION,	:	
Intervenors-Plaintiffs,	:	
-against-	:	76-CV-154
ROBERT F. KELLY, Chairman; JERRY A.	:	FINAL
DANZIG, Vice Chairman; MICHAEL H.	:	<u>JUDGMENT</u>
PRENDERGAST; ELI WAGNER; and EDWARD	:	
J. WEGMAN, Commissioners of the NEW	:	
YORK STATE COMMISSION ON CABLE TELE-	:	
VISION,	:	
Defendants,	:	
NATIONAL ASSOCIATION OF REGULATORY	:	
UTILITY COMMISSIONERS,	:	
Intervenor-Defendant,	:	
CITY OF NEW YORK,	:	
Amicus Curiae.	:	

----- x

Pursuant to the Memorandum Decision and Order of
this Court dated March 9, 1977, granting plaintiffs' motion
for summary judgment on the first claim in the complaint:

A. It is hereby ordered, declared, adjudged and
decreed:

1. The Federal Communications Commission ("FCC")
has the authority and jurisdiction to preempt the regulation of

pay cable rates and to prohibit state and local governments from regulating such rates;*

2. The FCC has validly preempted the regulation of pay cable rates and prohibited state and local governmental regulation of such rates;

3. Neither the State of New York nor any instrumentality thereof nor any locality therein has the authority to regulate pay cable rates;

4. Attempts by the New York State Commission on Cable Television ("State Commission"), including its Clarification of Policy dated March 1, 1976, to require cable television companies to file their pay cable rates and changes therein with the State Commission other than for purely informational purposes and to require such companies to specify said rates and changes in their franchises and to require such companies to obtain consent of the franchising locality and the State Commission for such rates and any changes therein are null and void; and

5. Pay cable rates may be determined and changed by any cable television company without the consent of any franchising locality or the State Commission.

B. Defendants, their agents, employees and all persons in active concert and participation with them are hereby

* Pay cable rates refer to per-channel and per-program charges for programs and services offered by cable television systems in addition to basic cable television services (i.e., the carriage of television signals and origination of access and other programs for which there is no separate charge in addition to the regular fee charged to all subscribers.)

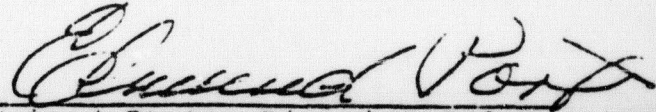
permanently enjoined and restrained from directly or indirectly:

1. Regulating or attempting to regulate pay cable rates in any manner;
2. Requiring or attempting to require cable television companies to specify their pay cable rates in their franchises, or requiring or attempting to require approval of such rates or changes by the State Commission or local franchising authority; and
3. Commencing any judicial, administrative or other proceedings or applying or threatening to apply any sanctions against any plaintiff or any cable television company for imposing or changing any pay cable rates without specifying any such rates or changes in its franchise, or without obtaining the approval of the State Commission or of any local franchising authority.

C. It is further ordered, adjudged and decreed that jurisdiction is retained by this Court for the purpose of enabling any of the parties to apply for such further relief as may be necessary or appropriate for the effectuation of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of violations thereof.

D. The Clerk is directed to make entry of final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

Dated: May 11, 1977


United States District Judge

SUMMONS

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV, INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLE-
VISION CORP.; TELEPROMPTER CABLE
SYSTEMS, INC.; WARNER CABLE OF
OLEAN, INC.; NATIONAL CABLE TELE-
VISION ASSOCIATION, INC.; NEW YORK
STATE CABLE TELEVISION ASSOCIATION,
and HOME BOX OFFICE, INC.,

Plaintiffs,

-against-

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD
J. WEGMAN, Commissioners of the NEW
YORK STATE COMMISSION ON CABLE TELE-
VISION,

Defendants.

To the above named defendants:

YOU ARE HEREBY SUMMONED and required to serve upon
Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for the
plaintiffs, whose address is 345 Park Avenue, New York, New
York, 10022, an answer to the complaint which is herewith
served upon you, within twenty (20) days after service of
this summons upon you, exclusive of the day of service. If
you fail to do so, judgment by default will be taken against
you for the relief demanded in the complaint.

Clerk of Court

Deputy Clerk

Date:

U.S. DISTRICT COURT
N.D. N.Y.
JUL 18 1973

AT SCHOEN
J. R. SOULE, Clerk
ALBANY

SUMMONS

COMPLAINT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----- x
:
BROOKHAVEN CABLE TV INC.; CAPITOL
CABLEVISION INC.; SAMSON CABLE- :
VISION CORP.; TELEPROMPTER CABLE :
SYSTEMS, INC.; WARNER CABLE OF :
OLEAN, INC.; NATIONAL CABLE TELE- : COMPLAINT
VISION ASSOCIATION, INC.; NEW YORK :
STATE CABLE TELEVISION ASSOCIATION, :
and HOME BOX OFFICE INC., :
:
Plaintiffs, :
:
-against- :
:
ROBERT F. KELLY, Chairman; JERRY A. :
DANZIG, Vice Chairman; MICHAEL H. :
PRENDERGAST; ELI WAGER; and EDWARD :
J. WEGMAN, Commissioners of the NEW :
YORK STATE COMMISSION ON CABLE TELE- :
VISION, :
:
Defendants. :
----- x

Nature of Claims and Jurisdiction

1. This is an action for a declaratory judgment that the attempt of the New York State Commission on Cable Television to regulate "pay cable" television rates violates orders of the Federal Communications Commission, the Communications Act of 1934, as amended, and the Constitution of the United States, and for an injunction against such regulation.

2. This action arises under the Constitution and laws of the United States, specifically the Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq., and the Supremacy Clause, the Commerce Clause, and the First and Fourteenth Amendments of the United States Constitution. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

COMPLAINT

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3. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1337, 1343(3) and 2201, and 47 U.S.C. § 401(b).

The Parties

4. Plaintiff Brookhaven Cable TV Inc., a subsidiary of UA-Columbia Cablevision, Inc. ("UA-Columbia"), is a corporation having its principal place of business in Brookhaven, New York, which operates a cable television system in Brookhaven. UA-Columbia operates other cable television systems in the State of New York through other subsidiaries.

5. Plaintiff Capitol Cablevision Inc., a subsidiary of American Television and Communications Corporation ("ATC"), is a New York corporation having its principal place of business in Albany, New York, which operates a cable television system in Albany. ATC operates other cable television systems in the State of New York through other subsidiaries.

6. Plaintiff Samson Cablevision Corp., an indirect subsidiary of Viacom International Inc. ("Viacom"), is a New York corporation having its principal place of business in Islip, New York, which operates a cable television system in Islip. Viacom operates other cable television systems in the State of New York through other subsidiaries.

7. Plaintiff TelePrompter Cable Systems, Inc., a subsidiary of TelePrompter Corporation ("TelePrompter"), is an Illinois corporation having its principal place of business in Elmira, New York, which operates a cable television system in Elmira. TelePrompter operates other cable television systems in the State of New York through other subsidiaries.

COMPLAINT

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8. Plaintiff Warner Cable of Olean, Inc., a subsidiary of Warner Cable Corp., is a New York corporation having its principal place of business in Olean, New York, which operates a cable television system in Olean.

9. Plaintiff National Cable Television Association, Inc. ("NCTA") is a voluntary non-profit corporation with its principal place of business in Washington, D.C. NCTA is the national trade association of the cable television industry. Its membership includes more than 1400 cable television systems with more than 6,000,000 subscribers in all fifty States of the United States.

10. Plaintiff New York State Cable Television Association ("NYCTA") is a New York voluntary non-profit corporation. NYCTA is a trade association of cable television systems operating in the State of New York. Its membership includes more than 80 cable television systems with more than 700,000 subscribers.

11. Plaintiff Home Box Office Inc. ("HBO") is a Delaware corporation having its principal place of business in New York, New York. HBO is engaged in supplying "pay cable" programming to cable television systems, including the systems owned by other plaintiffs and other cable television systems in New York State and throughout the United States. HBO programming is supplied to more than 380,000 subscribers throughout the nation, including more than 200,000 subscribers in New York State.

12. Plaintiff cable television companies provide HBO's programming and, in some cases, other pay cable programming

COMPLAINT

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to subscribers in New York State. Many of the members of plaintiffs NCTA and NYCTA similarly provide pay cable services to subscribers in New York State and (as to NCTA) throughout the United States.

13. Defendants are the members of the New York State Commission on Cable Television ("State Commission"), created by Chapter 466 of the Laws of 1972 of the State of New York, codified as Article 28 (Sections 811-831) of the New York Executive Law. The State Commission is empowered to oversee the development of cable television in New York State in certain respects to the extent consistent with federal law and the rules and regulations of the Federal Communications Commission ("FCC").

Introduction: The Nature of Pay Cable

14. Cable television systems provide certain basic services to subscribers for a monthly fee. Those basic services consist primarily of the retransmission by cable of local and distant over-the-air broadcast television signals under the exclusive jurisdiction of the FCC. This retransmission service of cable television permits subscribers to obtain better reception of local over-the-air television programs and to receive over-the-air television programs from distant points, often located outside of New York State. Cable television systems also transmit, without additional charge, programs originated for cable, including programs on various "access" channels mandated by the FCC.

COMPLAINT

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15. In addition to the aforesaid services, within recent years an increasing number of cable television systems in New York State and other parts of the United States have begun to provide other programming on a separate channel to those subscribers who desire it for an additional charge. This additional programming includes recent theatrical motion pictures (without commercials or editing), sports events which are not otherwise available to television viewers, and other forms of special entertainment and information. The distribution of such programming in this manner is called "pay cable." Pay cable, an infant industry, is a rapidly growing national communications medium, which offers the public the opportunity to see, at minimal cost and with no inconvenience, and without interruption from commercial advertising, a diversity of box-office attractions which are not otherwise available to home viewers.

16. Cable systems operate in interstate commerce and use over-the-air television signals in interstate commerce. In addition, pay cable itself is an interstate communications service. The business of HBO illustrates the interstate nature of pay cable. HBO presents a weekly schedule of approximately 84 hours of programming, including current theatrical motion pictures, sports and other forms of entertainment and information, on a network basis simultaneously to cable television systems in New York State and other states via various interstate facilities licensed by the FCC. Such facilities include microwave, multi-point distribution stations furnished by common carriers, facilities leased

COMPLAINT

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from AT&T and other common carriers, and domestic communications satellites and earth stations. HBO's programs include live events occurring outside of New York State and filmed and video-taped programming produced outside of New York State. Most cable systems in New York State affiliated with HBO receive programs by means of transmissions that travel in a distribution path through the States of New Jersey and Pennsylvania.

17. Acting in furtherance of its Congressional mandate, the FCC has the responsibility to develop cable as an integrated part of a unified nation-wide communications system and to foster development of this new technology as a multi-channel broadband communications system offering potential for a wide variety of services in the public interest. Pursuant to its statutory mandate and national communications goals, the FCC has authorized cable to engage in pay cable operations and has concluded that, in view of the public benefits offered by pay cable and its nascent status, the development and growth of this infant industry should be encouraged and that regulatory constraints should be minimized. Among other things, the FCC has in many rulings since 1971 preempted the pay cable field and determined that pay cable rates should not be subject to regulation by any governmental body but should be left to free marketplace forces. The FCC, after advising Congress of its intent to do so, has specifically preempted pay cable regulation in rule-making proceedings in which the New York State Commission on Cable Television participated.

COMPLAINT

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First Claim for Relief

18. The State Commission was created under the New York Executive Law. Section 819 of that Law provides that, after April 1, 1973, no cable television system may commence operations or expand its service area in New York unless it has been franchised by each municipality in which it proposes to provide or extend service. Section 821 provides that, except as therein stated, after April 1, 1973 no person shall exercise a franchise until that franchise has been confirmed by the State Commission. And Section 822 provides that no franchise may be amended without the approval of the State Commission.

19. Section 825 of the Executive Law provides that, except as therein stated, "the rates charged by a cable television company shall be those specified in the franchise." The franchises of most cable television systems in New York have heretofore generally specified only rates for regular services offered to all subscribers. Pay cable rates have not generally been specified in cable television franchises because the FCC has repeatedly ruled that it has preempted the field of pay cable rate regulation and that the States and localities may not regulate said rates.

20. The FCC repeated this policy recently in its First Report and Order adopted March 20, 1975, in its rule-making proceeding entitled In the Matter of Amendment of Part 76, Subpart G, of the Commission's Rules and Regulations Pertaining to the Cablecasting of Programs for which a Per-program or Per-channel Charge is Made (Docket No. 19554),

COMPLAINT

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52 F.C.C. 2d 1 (1975). The Report and Order provides, in pertinent part:

"216. As a final matter, we note that a number of cable television franchises contain provisions purporting to regulate subscription cable television [i.e., pay cable] or to ban the service entirely. We have specifically stated that '... the Commission has preempted the field of pay television cablecasting so that local franchise terms [purporting to regulate subscription cable-casting] are inoperative. ...' In paragraph 130 of the Cable Television Report and Order, the Commission stated:

... it is this Commission that must make the decisions as to conditions to be imposed on the operation of pay cable channels, and we have already taken steps in that direction. (See Section 76.225). Federal regulation is thus clearly called for.

"217. Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content. We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful, including most particularly free television, motion picture theaters, live sports, and other entertainment events. As we said with respect to over-the-air subscription rates:

The public is free to subscribe or not to subscribe to STV services [over-the-air pay television]. We believe that the marketplace will regulate the charges that are paid or that if they are excessive, the operations will not succeed. . .

In any case, we believe that the complex nature of subscription cablecasting and broadcasting, with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level." (Emphasis added; footnotes omitted)

21. On April 2, 1976, the FCC repeated its policy as to preemption of pay cable rate regulation:

COMPLAINT

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"In contrast to regular subscriber rates, we have taken the position that rates for subscription television programs, leased channels, advertising and other auxiliary services should not be regulated at either the local, state or federal levels at this time. It has been our belief that attempting to impose rate regulations on these specialized services, that are just beginning to develop, would be premature and would likely have a chilling effect on their development. Consistent with this view, the Commission has not only declined to regulate the rates for these services but has preempted their regulation by state and local authorities." (Notice of Inquiry in Docket No. 200767, In The Matter of Inquiry Into The Matter in Which Cable Television Regular Subscriber Rates Are Established)

22. The State Commission and certain plaintiffs officially participated in the FCC rule-making proceeding in Docket 19554, referred to in paragraph 20 hereof. The State Commission argued for rate regulation of pay cable and challenged the power of the FCC to preempt State and local regulation. Although the FCC rejected that claim, the State Commission did not seek reconsideration of, or appeal from, the FCC's Report and Order in Docket 19554.

23. Similarly, in a 1975 rule-making proceeding concerning the relationship of federal and state regulation, the FCC reviewed the Report of the Federal/State-Local Advisory Committee (FSLAC), which inter alia recommended retention of FCC preemption of pay cable regulation. In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television, Docket No. 20272, 34 Pike & Fischer Radio Reg. 2d 1229 (1975). In that proceeding,

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the FCC reaffirmed its policy of preemption of the pay cable field, noting both the interstate nature of pay cable and the Supreme Court's recognition that "the authority of this Commission regarding 'unified control' of the regulatory aspects of a new communications medium such as cable is very broad" (at 1238). The FCC repeated its duty to "preempt areas of cable regulation [including pay cable] in order to assure the orderly development of this new technology into the national communications structure" (at 1240). Noting that cable was a "new, capital intensive industry" with "vast potential," the FCC preempted State regulation of pay cable and other aspects of cable in order to discharge its exclusive responsibility to "allow cable television to develop and become an integral part of our national communications structure" (at 1242, 1244). The New York State Cable Commission participated in the aforesaid FCC proceeding but did not seek reconsideration of, or appeal from, the FCC's Report and Order.

24. Nevertheless, the State Commission has now undertaken to regulate pay cable rates in defiance of the FCC. Thus, on March 1, 1976 the State Commission issued a "Clarification of Commission Policy" in its proceeding entitled In the Matter of Rates Charged by Cable Television Companies for "Auxiliary" Programming (Docket No. 90010) (the "Clarification of Policy"). According to the Clarification of Policy:

"The language of the Executive Law and our Rules clearly require all subscriber rates to be established or modified only through the local franchise and with our approval. . .

COMPLAINT

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"The sole basis for any contrary conclusion is the FCC's purported preemption of the field. However, our actions must be guided by our clear statutory mandate until such time as a court of competent jurisdiction has ruled that the FCC has, in fact, duly limited that statutory mandate. . . .

"Not only do we fail to agree with the legality of the FCC's preemptive policy; we also question its wisdom."

The Clarification of Policy gives no reason for the State Commission's disagreement with the "legality of the FCC's preemption policy" except to state that "[t]he FCC's assertions in this matter have never been tested in a court of law."

25. The FCC's preemption of the field of pay cable rate regulation is lawful and within the jurisdiction of the FCC as defined by the United States Supreme Court in United States v. Midwest Video Corp., 406 U.S. 649 (1972) and United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Indeed, as long ago as 1968, the FCC authorized broadcast television stations to engage in over-the-air pay television operations and ordered that pay television rates should not be regulated but should be left to the marketplace. The FCC's authorization of pay television on that basis was upheld in National Association of Theatre Owners v. F.C.C., 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

26. The State Commission's present attempt to regulate pay cable rates in defiance of the FCC's preemption of this field and in defiance of the FCC's directive against such rate regulation is illegal and void under the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq., and the Supremacy Clause of the Constitution of the United States.

COMPLAINT

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27. The State Commission's Clarification of Policy warns that cable television systems which had established pay cable services before March 1, 1976 "will face appropriate sanctions" (which could include loss of their franchises) if they do not file their rates with municipalities and the State Commission by April 30, 1976, and that "[a]ctive enforcement of these policies will be undertaken."

28. Plaintiffs have no adequate remedy at law.

Second Claim for Relief

29. Plaintiffs repeat paragraphs 18-25 above.

30. As the FCC has determined, the nature of pay cable, "with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level." (See paragraph 20 above.) In this connection, the FCC, recently reaffirming its preemption of rate regulation of pay cable, declared that different rate regulation by different localities and States "might unduly hamper the obviously interstate effort involved by cable operators and programmers to secure a large enough audience to make this new communications medium a viable economic success." Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C. 2d 175, 185-86 (1974). The FCC added, quoting then Judge Warren Burger, that "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication" (Memorandum

COMPLAINT

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Opinion and Order, denying reconsideration of Clarification of the Cable Television Rules, 49 F.C.C. 2d 1078, 1082 (1974)).

31. For the foregoing reasons, the State Commission's attempt to regulate pay cable rates burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

32. Plaintiffs repeat paragraphs 27-28 above.

Third Claim for Relief

33. Plaintiffs repeat paragraphs 18-25 above.

34. New York State purports to regulate pay cable rates, but neither New York State nor any other governmental authority purports to regulate the rates of advertiser-supported television, radio, over-the-air pay television, hotelvision, video disks and cassettes, movie theaters, live theaters, closed-circuit prize fights and other events, sports arenas, concert halls, night clubs, book stores, newspapers, magazines, or other media of information, news and entertainment protected by the First Amendment of the Constitution of the United States.

35. Such anti-competitive discrimination between competing media of communications impinges upon First Amendment freedoms and is therefore subject to severe scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

36. The magnitude of this arbitrary and anti-competitive discrimination is illustrated in the case of

COMPLAINT

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current theatrical motion pictures. Most pay cable services, which generally charge a monthly fee of \$6 to \$9, typically offer eight new theatrical features each month (as well as repeats of other films and other forms of programs). If a family of four persons watches only the eight new feature films each month, the average cost per person for each film is only about 20¢ to 30¢. In contrast, theatres in New York State generally charge admission prices of \$2 to \$4 per person. Yet, New York State now proposes to regulate rates of pay cable but not motion picture theatres.

37. For the foregoing reasons, there is no legal basis for such discrimination.

38. The State Commission's attempt to regulate pay cable rates thus violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

39. Plaintiffs repeat paragraphs 27-28 above.

Fourth Claim for Relief

40. Plaintiffs repeat paragraphs 18-25 above.

41. Pay cable programming constitutes speech and expression protected by the First Amendment to the Constitution of the United States.

42. Regulation of pay cable rates therefore interferes with the exercise of First Amendment rights. The regulation of pay cable rates by the State Commission will make the transmission of some programming over pay cable commercially impossible, will prevent many pay cable subscribers from

COMPLAINT

23

receiving the programming of their choice at rates they are willing to pay, and thus will interfere substantially with free speech and expression.

43. Pay cable is an infant industry which faces vigorous competition from the established and popular advertiser-supported television, radio, over-the-air pay television, hotelvision, video disks and cassettes, movie theaters, live theaters, closed-circuit prize fights and other events, sports arenas, concert halls, night clubs; books, newspapers, magazines and other media of information, news and entertainment protected by the First Amendment.

44. The State Commission's attempt to regulate pay cable rates violates the First Amendment of the Constitution of the United States.

45. Plaintiffs repeat paragraphs 27-28 above.

WHEREFORE, plaintiffs demand judgment:

(a) declaring that the attempt of the State Commission to regulate pay cable rates is illegal and void;

(b) enjoining defendants from regulating or purporting to regulate pay cable rates; and

(c) granting to plaintiffs such other and further relief as is just.

Dated: April 7, 1976

DUGAN, LYONS, PENTAK, BROWN & TOBIN
100 State Street
Albany, New York 12207
(518) 436-7693

and

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-0000

By _____

Attorneys for Plaintiffs

ANSWER

24

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV, INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLE-
VISION CORP.; TELEPRCPTER CABLE
SYSTEMS, INC.; WARNER CABLE OF
OLEAN, INC.; NATIONAL CABLE TELE-
VISION ASSOCIATION, INC.; NEW YORK
STATE CABLE TELEVISION ASSOCIATION,
and HOME BOX OFFICE, INC.,

Plaintiffs,

- against -

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD
J. WEGMAN, Commissioners of the NEW
YORK STATE COMMISSION ON CABLE TELE-
VISION,

Defendants.

ANSWER TO
COMPLAINT

Civil Action
File No. 76CV154

Defendants, by their attorney, Louis J. Lefkowitz,
Attorney General of the State of New York, Kenneth J.
Connolly, Esq., of counsel, answering the complaint herein:

1. Admit the allegations contained in paragraphs
numbered "5", "6", "3" and "18".

2. Deny the allegations contained in paragraphs
numbered "1", "2", "3", "7", "16", "17", "25", "26", "28",

ANSWER

25

"31", "34", "35", "36", "37", "38", "41", "42", "43" and "44".

3. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "9", "10", "11" and "12".

4. Deny knowledge or information sufficient to form a belief as to the allegations contained in the second sentence of paragraph numbered "4".

5. Deny the second sentence of paragraph numbered "13" and allege that the authority of the New York State Commission on Cable Television is set forth in Executive Law, Article 28.

6. Deny the purported definition of cable television systems which is alleged in paragraph numbered "14" and allege that definitions of cable television systems are contained in Executive Law, Section 812(2) and 47 C.F.R. Section 76.5(a).

7. Deny the purported definition of pay cable which is alleged in paragraph numbered "15" and allege that

ANSWER

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the definition of cable television system contained in Executive Law, Section 812(2), includes pay cable services.

8. Deny the allegations contained in the second sentence of paragraph numbered "19".

9. Admit that the language quoted in paragraph numbered "20" is taken from the First Report and Order in Docket No. 19554, FCC 75-369, 52 F.C.C. 2d 1, 33 RR 2d 367 (1975).

10. Admit that the language quoted in paragraph numbered "21" is taken from the Notice of Inquiry in Docket No. 20767, FCC 76-314, 58 F.C.C. 2d ____, 36 RR 2d ____ (April 2, 1976).

11. Deny that part of paragraph numbered "22" which reads "the FCC rejected that claim" and allege that the First Report and Order in Docket No. 20272, FCC 75-897, 54 F.C.C. 2d 855, 34 RR 2d 1229 (1975) speaks for itself.

12. Deny the allegations contained in paragraph numbered "23" and allege that the Report and Order, FCC 75-897, ____ F.C.C. 2d ____, 34 RR 2d 1229 speaks for itself.

ANSWER

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13. Deny the allegations contained in paragraph numbered "24", except admit that on March 1, 1976, defendants issued a "Clarification of Commission Policy," Docket No. 90010, which speaks for itself.

14. Admit that defendants issued a "Clarification of Commission Policy" as alleged in paragraph numbered "27" and allege that the Clarification speaks for itself.

15. Deny the allegations contained in paragraph numbered "30" and allege that the Clarification in Docket Nos. 20018, et al., FCC 74-384, 46 F.C.C. 2d 175, 29 RR 2d 1621 (1974) and Memorandum Opinion and Order in Docket Nos. 20018, et al., FCC 74-1278, 49 F.C.C. 2d 1078, 32 RR 2d 1 (1974) speak for themselves.

FIRST DEFENSE

16. The Court lacks jurisdiction of the subject matter of the action.

SECOND DEFENSE

17. Plaintiffs National Cable Television Association, Inc., New York State Cable Television Association, Home Box

ANSWER

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Office, Inc. and Teleprompter Cable Systems, Inc. lack standing to maintain this action.

THIRD DEFENSE

18. The complaint fails to state a claim against defendants upon which relief can be granted.

FOURTH DEFENSE

19. Plaintiffs have failed to exhaust their administrative remedies.

FIFTH DEFENSE

20. Plaintiffs have a complete and adequate remedy in the Courts of the State of New York.

SIXTH DEFENSE

21. There is no justiciable controversy existing between plaintiffs and defendants.

SEVENTH DEFENSE

22. Plaintiffs have failed to join an indispensable party.

ANSWER

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WHEREFORE, defendants demand that the complaint herein be dismissed, together with the costs and disbursements of this action.

DATED: Albany, New York
April 30, 1976

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendants
Office and P. O. Address
The Capitol
Albany, New York 12224
Telephone: (518) 474-3340

By: s/ Kenneth J. Connolly
Kenneth J. Connolly
Principal Attorney

TO:

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& TOBIN, ESQS.
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PAUL, WEISS, RIFKIND, WHARTON
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Attorneys for Plaintiffs
Office and P. O. Address
345 Park Avenue
New York, New York 10022

STIPULATION

30

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

MAY 21 1976

AT O'CLOCK M.
J. R. SCULLY, Clerk
ALBANY

76-CV-154

-----x
BROOKHAVEN CABLE TV, INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.; NATIONAL
CABLE TELEVISION ASSOCIATION, INC.;
NEW YORK STATE CABLE TELEVISION
ASSOCIATION, and HOME BOX OFFICE, INC.,

Plaintiffs,

--against--

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD J.
WEGMAN, Commissioners of the NEW YORK
STATE COMMISSION ON CABLE TELEVISION,

Defendants.
-----x

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the
undersigned, attorneys for the parties hereto, as follows:

1. Paragraph 7 of the Complaint herein be and is hereby
amended so as to delete "Plaintiff TelePrompter Cable Systems, Inc."
and to insert in its place "Plaintiff Teleprompter Electronics
Corporation";

2. Paragraph 7 of the Complaint herein be and is hereby
further amended to add "through its division, Elmira Video Division",
after "Elmira" in line five of that Paragraph; and

STIPULATION

31

3. The caption of this action be and is hereby amended so as to substitute "Teleprompter Electronics Corporation" for "TelePrompter Cable Systems, Inc." as a plaintiff herein.

Dated: Albany, New York
May , 1976

DUGAN, LYONS, PENTAK, BROWN & TOBIN
Attorneys for Plaintiffs
Office and P.O. Address
100 State Street
Albany, New York 12207
(518) 436-7693

By _____
Kevin P. Glasheen

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York
Attorney for Defendants
Office and P.O. Address
The Capitol
Albany, New York 12224
(518) 474-3340

By _____
Kenneth J. Connolly
Principal Attorney

SO ORDERED: *May 17, 1976*

U.S.D.J.

NOTICE OF MOTION

32

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- - - - -x

BROOKHAVEN CABLE TV INC.; CAPITOL :
CABLEVISION INC.; SAMSON CABLEVISION :
CORP.; TELEPROMPTER CABLE SYSTEMS, :
INC.; WARNER CABLE OF OLEAN, INC.,; :
NATIONAL CABLE TELEVISION ASSOCIATION, :
INC.; NEW YORK STATE CABLE TELEVISION : Civil Action
ASSOCIATION; and HOME BOX OFFICE INC., : No. 76 CV 154

Plaintiffs, :
-against- : MOTION FOR
SUMMARY
JUDGMENT

ROBERT F. KELLY, Chairman; JERRY A. :
DANZIG, Vice Chairman; MICHAEL H. :
PRENDERGAST; ELI WAGER; and EDWARD :
J. WEGMAN, Commissioners of the :
NEW YORK STATE COMMISSION ON CABLE :
TELEVISION, :

Defendants. :
- - - - -x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Gerald M. Levin, and upon all prior proceedings herein, the undersigned will move this Court at a Motion Term thereof, to be held at the United States District Court for the Northern District of New York, United States Post Office and Courthouse, Syracuse, New York, on May 10, 1976, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order granting summary judgment for plaintiffs on their first claim for relief, upon the ground that state and local regulation of prices charged for pay cable television programs is prohibited and

NOTICE OF MOTION

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preempted by action of the Federal Communications Commission,
and granting to plaintiffs such other and further relief as
is just.

Dated: April 30, 1976

Yours, etc.,

DUGAN, LYONS, PENTAK, BROWN & TOBIN
Office and P. O. Address
100 State Street
Albany, New York 12207

and

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Office and P. O. Address
345 Park Avenue
New York, New York 10022

TO: LOUIS J. LEFKOWITZ, ESQ.
Attorney General
Justice Building
Empire State Plaza
Albany, New York 12223

AFFIDAVIT IN SUPPORT OF MOTION

34

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
: BROOKHAVEN CABLE TV INC.; CAPITOL :
: CABLEVISION INC.; SAMSON CABLEVISION :
: CORP.; TELEPROMPTER CABLE SYSTEMS, :
: INC.; WARNER CABLE OF OLEAN, INC.; :
: NATIONAL CABLE TELEVISION ASSOCIATION, :
: INC.; NEW YORK STATE CABLE TELEVISION :
: ASSOCIATION; and HOME BOX OFFICE INC., : Civil Action
: : No. 76 CV 154
: Plaintiffs, :
: :
: -against- : AFFIDAVIT
: :
: ROBERT F. KELLY, Chairman; JERRY A. :
: DANZIG, Vice Chairman; MICHAEL H. :
: PRENDERGAST; ELI WAGER; and EDWARD :
: J. WEGMAN, Commissioners of the :
: NEW YORK STATE COMMISSION ON :
: CABLE TELEVISION, :
: Defendants. :
: :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GERALD M. LEVIN, being sworn, states:

1. I am President of plaintiff Home Box Office, Inc. ("HBO") and am submitting this affidavit in support of plaintiffs' motion for summary judgment, in order to explain to the Court the nature of the "pay cable" television industry.

2. Cable television systems provide certain basic services to subscribers for a monthly fee. Those basic services consist primarily of the retransmission by cable of local and distant over-the-air broadcast television signals which are under the jurisdiction of the Federal Communications Commission ("FCC"). This retransmission service of cable television permits subscribers to obtain

AFFIDAVIT IN SUPPORT OF MOTION

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better reception of local over-the-air television programs and to receive over-the-air television programs from distant points, often located outside of New York State. Cable television systems also transmit, without additional charge, programs originated for cable, including programs on various "access" channels mandated by the FCC. Plaintiffs Brookhaven Cable TV Inc., Capitol Cablevision Inc., Samson Cablevision Corp., TelePrompter Cable Systems, Inc. and Warner Cable of Olean, Inc. are among the cable television system operators which provide basic cable television service in New York State.

3. In addition to the basic cable services described above, within recent years an increasing number of cable television systems in New York State and other parts of the United States have begun to provide other programs on a separate channel to those subscribers who desire it for an additional charge. This additional programming includes recent theatrical motion pictures (without commercials or editing), sports events which are not otherwise available to television viewers and other forms of special entertainment and information. The distribution of such programming in this manner is called "pay cable." Pay cable, an infant industry, is rapidly becoming a significant national communications medium which offers the public the opportunity to see in their own homes, at minimal cost and without interruption from commercial advertising, a diversity of box-office attractions which are not otherwise available to home viewers.

4. HBO is engaged in obtaining, transmitting and supplying this "pay cable" programming to cable

AFFIDAVIT IN SUPPORT OF MOTION

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television systems, including the systems owned by other plaintiffs and other cable television systems in New York State and throughout the United States. HBO programming is supplied to more than 380,000 subscribers throughout the nation, including more than 200,000 subscribers in New York State. A copy of a May, 1976 HBO program guide is attached hereto as Exhibit "A" and is illustrative of the types of programming provided by HBO.

5. Cable television systems operate in interstate commerce and use over-the-air television signals in interstate commerce. In addition, pay cable itself is an interstate communications service. The business of HBO illustrates the interstate nature of pay cable. As the attached HBO program guide demonstrates, HBO presents a weekly schedule of approximately 84 hours of programming, including current theatrical motion pictures, sports and other forms of entertainment and information. This programming is presented on a network basis simultaneously to cable television systems in New York State and other states by means of various interstate facilities and services licensed by the FCC. Such facilities and services include earth station satellite receivers licensed by the FCC and transmission services and paths provided pursuant to FCC tariffs by common carriers, including point-to-point terrestrial microwave transmission, multi-point terrestrial microwave transmission, "long-lines" provided by AT&T and domestic communications satellite transmission provided by RCA Americom. HBO's programs include live events transmitted

AFFIDAVIT IN SUPPORT OF MOTION

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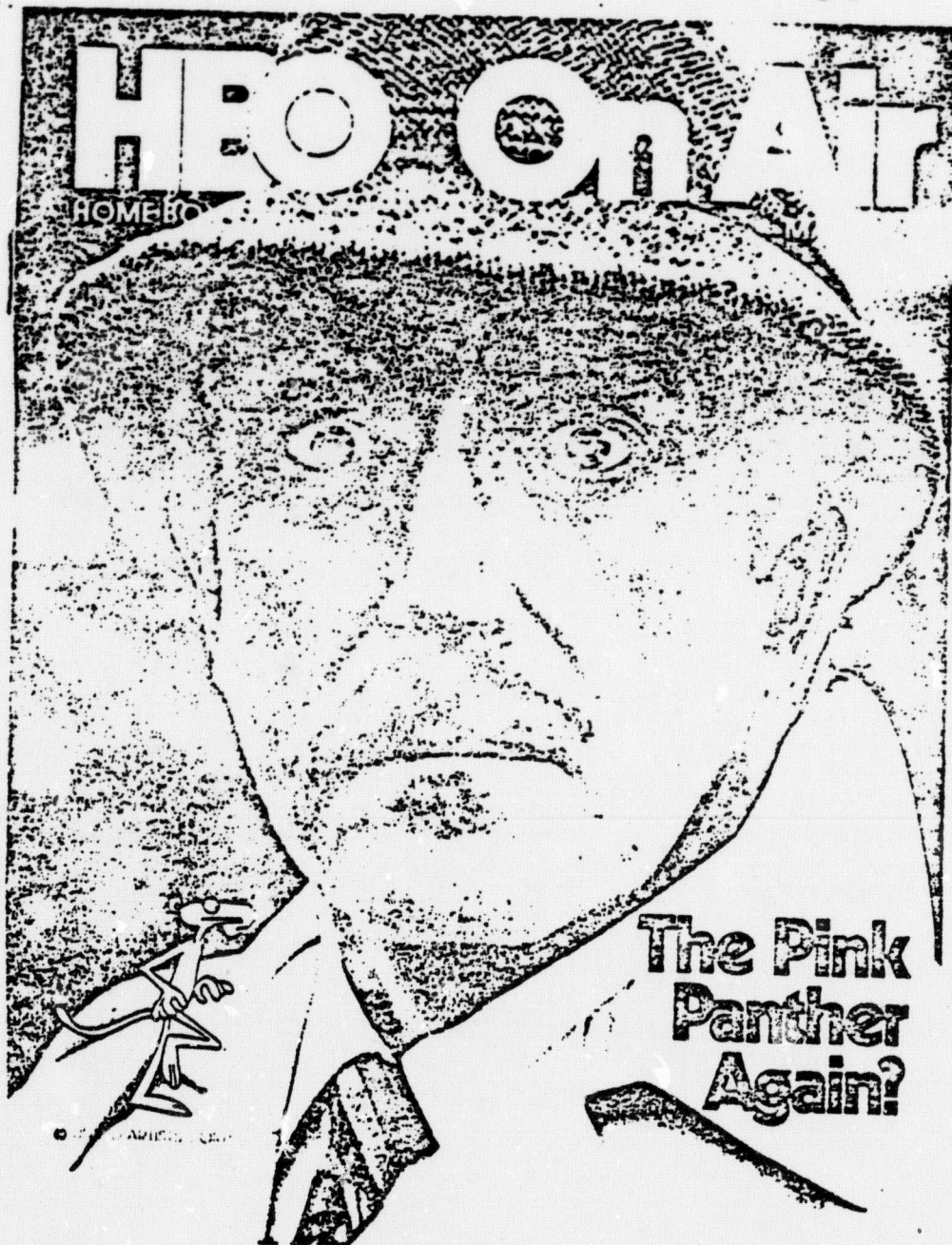
from outside of New York State and filmed and video-taped programming produced outside of New York State. Most cable systems in New York State affiliated with HBO receive programs by means of transmissions that travel in a distribution path through the States of New Jersey and Pennsylvania (through an interstate transmission path indicated in Exhibit "B" attached hereto) and occasionally receive HBO programming transmitted from other parts of the country and the world by means of a communications satellite.

6. As explained in plaintiffs' brief, the FCC has preempted all regulation of pay cable, including regulation of rates charged to subscribers. In view of the facts stated above and the other considerations discussed in plaintiffs' brief, I respectfully submit that the FCC acted within its powers in ordering such preemption. I therefore respectfully request that plaintiffs' motion for summary judgment declaring invalid the New York State Commission on Cable Television's attempt to regulate pay cable rates be granted, and that an injunction be issued prohibiting the State Commission from regulating pay cable rates.

Gerald M. Levin
Gerald M. Levin

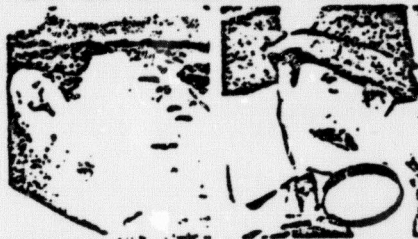
Sworn to before me this
29th day of April, 1976.

Susan P. Carr
SUSAN P. CARR
Notary Public, State of New York
No. 319322995
County of New York
Commission Expires March 30, 1978



HBO

HOME BOX OFFICE FROM TIME/LIFE



STARS On Air THIS MONTH

PREMIERES

The Fortune (Jack Nicholson)
May 1, 4, 6, 21
Butley (Alan Bates)
May 3, 6, 9, 17, 25
The Return of the Pink Panther
May 7, 8, 11, 30
Mr. Super Invisible (Dean Jones)
May 10, 13, 24, 27
Brother, Can You Spare a Dime?
May 17, 21, 23, 28, 31
Seven Alone
May 21, 22, 25
Project Kill (Gary Lockwood)
May 24
Peepers (Natalie Wood)
May 24, 27, 30
Pardon My Blooper
May 24, 27, 28, 30
The Longest Yard (Burt Reynolds)
May 28, 29
The Human Factor (George Kennedy)
May 31

SPORTS

World Team Tennis
May 5, 12, 19, 26
Soccer
May 2, 16
High School All-Star Basketball
May 22
World Championship Karate
May 29

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Herman Werskoff (Sports)
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CIRCULATION DIRECTOR Susan Rose

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Home Box Office adheres to its published schedule as closely as possible. From time to time circumstances beyond our control or the opportunity to

offer a program of greater interest may require a change. When this occurs, HBO provides notice as far ahead of the schedule change as possible.

EXHIBIT A - MAY 1976 HBO PROGRAM GUIDE
ANNEXED TO LEVIN AFFIDAVIT

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APRIL PREMIERES

Earthquake (Charlton Heston)
May 1
Royal Flash (Malcom McDowell)
May 2,22
The Voyage (Richard Burton)
May 2
Jules and Jim (Jeanne Moreau)
May 2
Silence
May 3,7,16,20
Memory of Us
May 4,11
Paper Tiger (David Niven)
May 5,9,14
Spots
May 5,19,26
The Man in the Glass Booth
May 16

SPECIALS

Les Folies Bergeres
May 6,8,20
On Location: Rodney Dangerfield
May 13,28
Freddie Prinze and Friends
May 14,15,18,26,29

YOUNG PEOPLE'S FILMS

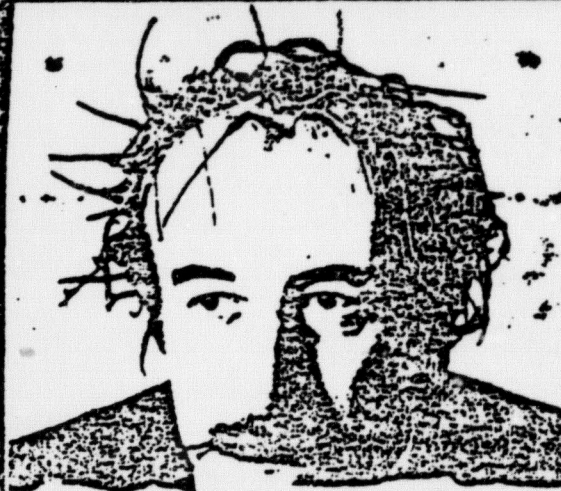
The Space Explorers
May 1,10,17,26
Pippi Longstocking
May 3,12
Pippi in the South Seas
May 3,5,19
Mr. E from Tau Ceti
May 4,6,8
The Lupinek Case
May 11,13
Pinocchio's Greatest Adventure
May 18,20,22
Doggie and Three
May 25,27
Robin Hood: Part 1
May 10,14,15
Robin Hood: Part 2
May 21
Robin Hood: Part 3
May 24,28,29

ENCORES

Beyond the Door
May 7,22
Blume in Love (George Segal)
May 14,20
Dirty Mary, Crazy Larry
May 9,13
The Front Page (Jack Lemmon)
May 23
Harry and Tonto (Art Carney)
May 10
Huckleberry Finn (Harvey Korman)
May 31
Magnum Force (Clint Eastwood)
May 15,18
Rafferty and the Gold Dust Twins
May 1,7,16
Report to the Commissioner
May 17,29
Return of the Dragon (Bruce Lee)
May 3,14,23
Ripped Off (Robert Blake)
May 13
Shoot It: Black, Shoot It: Blue!
May 11
The Speed Merchants (Mario Andretti)
May 4,15
The Stepford Wives (Katharine Ross)
May 15,31
The Terminal Man (George Segal)
May 18,23
The White Dawn
May 5,25,30
The Yakuza (Robert Mitchum)
May 8,27

FOREIGN FEATURES

Before the Revolution
May 5,9,12
The Spider's Stratagem
May 12,16,19
The Bicycle Thief
May 19,23,26
The Bride Wore Black (Jeanne Moreau)
May 26



Sellers is back
with pratfalls,
and the Panther

Master of the Mishap

Peter Sellers finds life can be an electrifying experience.

Peter Sellers is a rarity in contemporary comedy. As witnessed in his outburst, United Artists' *The Return of the Pink Panther*, Sellers is a clown among comedians. From priest to prime minister to bungling detective, Sellers' career is a vast spectrum of memorable rogues ranging in degree, but consistent in comic payoff.

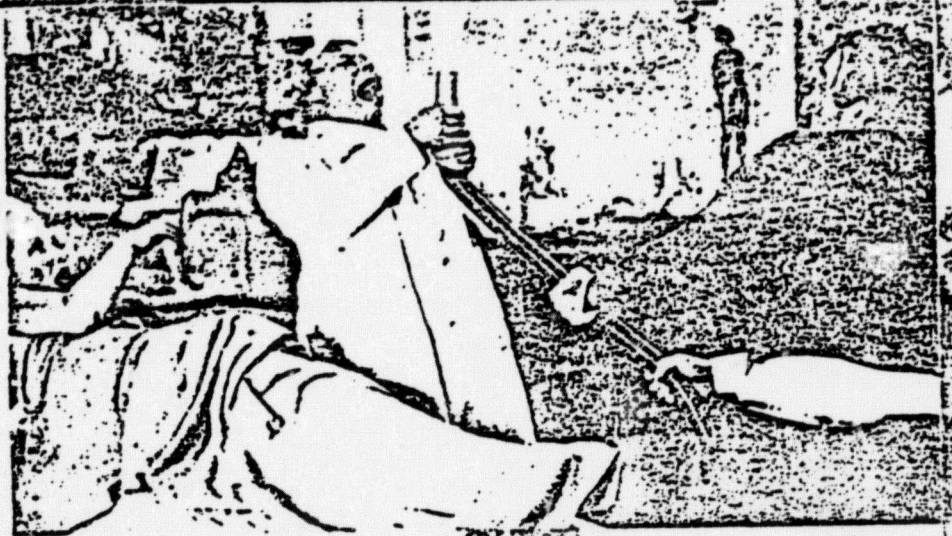
Although primarily a visual comic, Sellers establishes a new character before developing the physical personality. Confessing "I have no personality of my own," Sellers realizes "I have to put on a special voice and use it as a shield so a character can grow behind it."

Reared in the music halls by show biz parents, Sellers quickly enlarged his natural talent as a mimic into a stage commodity. Radio was a natural for a talented voice and Sellers managed to apply his mimicry to land a job. Impersonating a radio star, he faked a friendly phone call to the program producer of the BBC, advising the executive to hire a bright new radio personality named...Peter Sellers. The ploy worked and his voice was soon one of the most popular in Britain.

Then Sellers landed the coveted three-character starring role in the international box office hit, *The Mouse that Roared*. For the next five years he worked steadily in film, producing 18 comic characterizations and finally a near fatal heart attack.

Shortly before his illness, Sellers scored an impressive success as the star of *The Pink Panther* and its lovable sequel, *A Shot in the Dark*. He gave full passion to the role of the klutzy constable, Inspector Clouseau. The product is pure slapstick, the kind that gets a laugh in any language.

lls



A decade later, a chance meeting with the Panther's originator, Blake Edwards, brought the fractured French flic back to life. Once again Clouseau is involved in the mysterious disappearance of the fabulous tinted diamond, the Pink Panther. Suspecting the infamous jewel thief, The Phantom, Sellers launches into a sterling performance as the inept manhunter; revitalizing what Jay Cocks of *Time* called "one of Sellers' best creations." And since production is now concluding in England on the fourth Clouseau go-around, *The Pink Panther Strikes Again*, Sellers obviously agrees.

May 7, 8, 11, 30

Panther star Sellers tries to clean up the mystery (above), but only ends up getting himself into a real mess (right).



Bob Aldrich calls the plays in *The Longest Yard* **Filmdom's Football Freak**

By Gary J. Prebula

For thousands of Monday morning quarterbacks their dreams of glory must be played out on the sidelines. Not so for producer-director Robert Aldrich (*Whatever Happened to Baby Jane?*, *The Dirty Dozen*). Directing box office bonanza *The Longest Yard* gave Aldrich the chance of a bleacher coach's lifetime. "I'm a football freak, a real fanatic," Aldrich told *On Air*, as he explained why he spent four weeks filming the football game that is the heart of the movie. "If the game didn't work, the film wouldn't." Both do.

Aldrich's recurring theme of a fallen man in search of self-esteem surfaces again in *The Longest Yard*. Burt Reynolds is a jailed ex-NFL star who must put-up or shut-up in the brutal match between prisoners and guards.



EXHIBIT A - MAY 1976 HBO PROGRAM GUIDE
ANNEXED TO LEVIN AFFIDAVIT

44

For Aldrich, *The Longest Yard* was his first foray onto the gridiron since his days as a lineman at the University of Virginia. Aldrich deserted his family profession (banking) for Hollywood, where he soon tackled his first love—directing. Los Angeles produced his second—the Rams.

Football, Aldrich says, is an outpost of "nondiminishing values. The things you used to hold near and dear are no longer there. Your doctor's on strike, your lawyer's a crook and the taxman is taking money under the table. But football's basics are terribly simple. You have four downs to make ten yards." He also feels that football helps discharge audience tensions so "fans come away less anti-social, less brutalized than before."

The Longest Yard unites Aldrich's profession and passion for the first time. "I've had some pretty close calls returning to the set after a football weekend," Aldrich says, recalling the time he flew from London to L.A. for a Rams-49ers game. "Usually when in Europe I listen to the 3 a.m. broadcast on Armed Forces Radio." He has a new problem: "Football is now so sophisticated I doubt if one out of 10,000 fans understands its nuances. Being an educated second guesser is a lost art."

May 28, 29, June 1.



Burt Reynolds quarterbackes the prisoners' team
in Bob Aldrich's *The Longest Yard*



Alan Bates in *Butley*

Brother, Can You Spare a Dime? Phillippe Mora's intricate blend of feature film clips, newsreels and home movies examines America's twelve turbulent years between the advent of the Depression and the bombing of Pearl Harbor. A parade of musical hits narrates an otherwise dialogue-free march of time. This breezy look at events both great and small, as *Time* said, "can bring history close as no transcript or historic can."

(PG-1:43) May 10, 11, 12, 16, 28

Butley The American Film Theatre's striking production of playwright Simon Grey's raging study of a man on his way down is highlight-

ed by both a Tony Award-winning performance and the director's debut of a top British playwright. Alan Bates and director Harold Pinter bring their stage collaboration to the screen as a self-destructive university professor loses his wife, his gay lover and his academic respect during the worst day of his life. (2:10) May 3

The Fortune Greed is the new comedy con game casting a car winner Jack Nicholson and *Shampoo* star Warren Beatty as a pair of no-class bunglers in a desperate gambit for easy money. A complicated scheme has sent Nicholson wedded to Stockard Channing, while Beatty awaits divorce and a life of luxury as her "second" husband. 1920s tale is director Mike Nichols' first screen comedy in five years. (PG-1:28) May 1, 4

The Great American Cowboy Larry Mahan is a tough, old-time puncher who happens to be America's number one rodeo superstar. Newcomer Philip Lyne is neither number one, but he too is a tough and has earned a reputation for fighting harder. Their inevitable showdown took place during the year-long rodeo season. Filmmaker Keith Miller's passionate tribute to a dying American institution is a richly deserved Academy Award best documentary feature. (G-1:30) May 17, 21, 23

The Human Factor Director Edward Dmytryk was blacklisted by Hollywood studio production

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early 1950s for alleged Communist leanings. Those attitudes, as witnessed by his current picture, shot in Naples, may now be more right wing than left. George Kennedy is the star of this violent tale of a United States military intelligence officer who has sworn he will avenge the senseless and brutal killing of his wife and three children by political terrorists. (R-1:31) May 31, June 3

The Longest Yard An ex-NFL star quarterback (Burt Reynolds) is the convict in the middle of a gridiron showdown. This hard-hitting film was shot at the Georgia State Prison. Eddie Albert is the warden. (R-2:01) May 28, 29, June 3

Mr. Super Invisible Dean Jones is the American scientist who finds out how to make himself disappear in this story of scientific skullduggery. Enemy agents are determined to get their hands on him, but Jones is a hard man to see, let alone latch on to. Shot on location in Europe the movie features an aerial chase through the skies of the Continent, climaxing with both the viewer and the formula floating in mid-air. (G-1:31) May 10, 13, 24, 27

Pardon My Blooper Kermit Schaffer's vast storehouse of mass media blunders, boners, spoonerisms, double-entendres, malapropisms and Freudian slips has been the source of many books and humor LPs. This picture presents a series of candid-camera-like skits that restage the best of those infamous mistakes. The film's highlights include the famous introduction of President Hoo-

ver and kiddie show host Uncle Don's not-to-be-heard sign-off. (R-1:22) May 24, 27, 28, 30

Peeper Los Angeles has oft been portrayed as open territory for anyone with a license to carry a concealed weapon. Stylishly nostalgic credits introduce Michael Caine as the latest L.A. gumshoe in this tongue-in-cheek caper. The plot—a search for a missing heiress—is familiar, however the humor and cast are anything but, especially Natalie Wood's first film appearance in five years. The film meticulously recreates the Los Angeles of the 1940s. (PG-1:27) May 24, 27, 30, June 4

Warren Beatty in *The Fortune*



Project Kill Leslie Nielsen and Gary Lockwood star in this behind-the-headlines tale of sanctioned assassination. Project leader Nielsen wants to come in from the cold but there's no exit for this executioner. The Philippine Islands are the backdrop for the showdown between Nielsen and protege Lockwood.

(R-1:30) May 24

The Return of the Pink Panther Slap schtick strikes again. Crime-fighting clown Inspector Clouseau is on the loose once more, joined by Christopher Plummer, Catherine Schell and Herbert Lom. "It's like taking a long, wild sail off a banana peel," says *The New York Times*.

(G-1:53) May 7, 2, 11, 30

Rollerball James Caan is a super sports star in this look at the repercussions of social ultra-violence. Set in the year 2018, a brutal roller derby contest pacifies a warless world with prime time bloodbaths. John Houseman co-stars as the top

man on the corporate power ladder. (R-2:03)

Seven Alone In 1843 the Sager family left their Missouri farm and began a 2,000 mile trek along the Oregon Trail. Neither Pappy Sager nor his wife lived to see their "Promised Land." Parentless, their seven children inherited the dream and continued the journey alone. A saga of survival and determination for the entire family, this heart-felt production traces a remarkable true adventure based upon a novelization of Catherine Sager's memoirs. (G-1:37) May 21, 22, 27

George Kennedy in *The Human Factor*



Earthquake Charlton Heston faces domestic squabbles and collapsing cities as Los Angeles disappears into thin smog. (PG-2:02)

Jules and Jim Two men in love with Jeanne Moreau. (1:44)

The Man in the Glass Booth A piercing look at mass guilt. (1:57)

Memory of Us Idyllic home life becomes hell for housewife. (PG-1:34)

Paper Tiger Cowardly David Niven is shamed into heroics. (G-1:41)

Royal Flash Malcolm McDowell as a 19th century rogue. (PG-1:39)

Silence Deaf orphan is lost in Santa Cruz mountains. (G-1:31)

Spots Boy in Africa finds people are more important than pets. (G-1:26)

The Voyage Loren and Burton are ill-fated lovers. (PG-1:43)



A super summer
season of
soccer on HBO

Pelé!

He has been given a parade down the Champs Elysées, has been received at Buckingham Palace and the White House, has had his feats commemorated on postage stamps and in songs, has been cheered by people all over the globe and has heard vast crowds chant his name over and over: "Pelé! Pelé! Pelé!"

Although he seems to have been playing long enough to have endured several careers, Pelé is still a marvel, a graceful-dynamic athlete. He has yet one major goal—to make soccer as popular in the United States as it is around the world. Last year he took the first giant stride toward that objective by signing a multi-year contract to play for the New York Cosmos of the North American Soccer League. Now, at age 35, he will be back with the Cosmos as the NASL begins a new season. And now you will be able to see Pelé and the fast-paced action of the NASL exclusively on HBO.

Our season will begin May 2, when the Cosmos and Pelé kick off their home stand against Chicago in the lavishly refurbished Yankee Stadium. On May 16th you'll see action from the West Coast, when San Jose hosts Vancouver. Throughout the rest of the summer you will see the best games between the 20 teams of the NASL, as well as getting a chance to look at such young American soccer stars as Kyle Rote, Jr. HBO's soccer season will climax with exclusive coverage of the NASL playoffs.

May 2, 1976



THE WTT ON HBO

May 5	Indiana vs. Phoenix
May 12	Hawaii vs. Pittsburgh
May 19	New York vs. Los Angeles
May 26	Phoenix vs. New York
June 2	New York vs. Pittsburgh
June 9	Pittsburgh vs. Cleveland
June 12	Hawaii vs. New York
July 7	San Francisco vs. L.A.
July 14	San Diego vs. New York
July 21	Pittsburgh vs. Phoenix
July 28	Pittsburgh vs. Indiana
Aug. 4	Hawaii vs. Pittsburgh
Aug. 11	Cleveland vs. Boston
Aug. 13	Phoenix vs. New York



WTT's court is packed with aces

Winning Women

The two most impressive newcomers to the World Team Tennis circuit this year are both women: Fort Lauderdale's Chris Evert and Czechoslovakia's Martina Navratilova. You'll be seeing them and other outstanding female tennis players starting May 5 and virtually every Wednesday throughout the season into the playoffs.

When not being squired about by President Ford's son Jack, Jimmy Connors and other bachelors, Evert will be playing for the Phoenix Racquets. She won a record \$352,227 in 1975 and is the No. 1 women's player in the world. But the WTT rookie insists that to retain her ranking she will have to make adjustments in her game.

"I'd like to be more an all-round court player," says Evert. "I want to try some new shots, want to rush the net more and I need to improve my serve."

Chris is also anxious to display more on-court emotion in the hope that it will unburden her of her Miss Stoned reputation. With that end in mind, she points out, "I've already cried a few times in tough situations."

Left-handed Martina Navratilova is one competitor whose drive to supplant Evert as the best player may cause Chris to shed more tears than she wants to. At 19, Navratilova is two years younger than Evert. She will unleash her aggressive game for the Cleveland Nets.

Other top-flight women players in the WTT ranks include current Wimbledon champion Billie Jean King and Virginia Wade of the New York Sets, Rosie Casals of the Los Angeles Strings and Yvonne Goolagong Cawley of the defending champion Pittsburgh Triangles.

Male tennis stars are in no short supply either in the WTT: Rod Laver and Vijay Amritraj of the San Diego Friars; Ilie Nastase of the Hawaii Leis; Tom Okker of the Golden Gaters; Tony Roche of the Phoenix Racquets; and Mary Riessen and Clark Graebner of the Cleveland Nets will all be seen on HBO.

May 5, 12, 19, 26

Yvonne Goolagong (top),
Billie Jean King (middle)
and Chris Evert (bottom)
will be swinging for the
WTT this year.

Photographs by
Dan Bahotti



Freddie and friends serve up a funny feast **The Prince of Comedy**

Freddie Prinze, star of *Chico and the Man*, will be master of ceremonies this month for an HBO special of young comics from Los Angeles' improvisation club. Prinze himself labored hard and long at New York's improvisation only a few years ago, and these comedians are all friends of Prinze that he has worked with before. Freddie will give you some of his own act, as well as doing some bits with his friends.

These comics are in the same position now that Freddie was just three years ago. Then, Freddie was a student at New York's High School of Performing Arts, doing his routines during lunch hour in the school washroom and working after hours at the improvisation. "I would go down to Budd Friedman's improvisation club every night and wait my turn with other performers to get on stage. Lots of nights I wouldn't get on until 3 a.m., but Friedman liked me and I made a few bucks at it. But it was tough getting to school for the first class." This finally led to a spot on one of the last Jack Paar specials. "But it was the 'Tonight' show in December 1973 that changed my life," Freddie confesses. James Komack, creator-producer of the *Chico and the Man* series saw Prinze on that Carson show just at the time he was looking for someone to play Chico. Komack rates Freddie this way, "He's the best comic to come along in 20 years."

The new comics who may soon burst on the scene like Freddie can be seen on HBO on May 14, 15, 18, 26, 29.

Steverino!

Steve Allen, a familiar face to generations of television viewers, will be hosting HBO's exclusive *On Location* series. Starting this month, Steve, host of the original "Tonight" show and a comedian, composer and author himself, will tell you not only about each comic's background, but will give a perspective on where each one fits into the incredible range of comedy. It takes a man with that many talents to be funny while being serious about being funny.



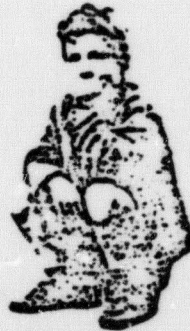


Before the Revolution

In 1964 Bernardo Bertolucci (*Last Tango in Paris*) made this penetrating portrait of the Italian contradiction (a wealthy Catholic Communist). An instant critical success, the autobiographical film deals with a student's wild love affair with his aunt, a fling with the Communist party and a final return to middle class convention. An invigorating, dramatic film (1:50) **May 5, 9, 16**

The Spider's Stratagem

Caught between *The Conformist* and *Last Tango in Paris*, Bertolucci's 1970 film was overlooked in its American engagement. This dazzling mystery, described by *Time* as "Bertolucci's best," concerns a son's efforts—some 30 years later—to uncover his hero father's assassin. The son discovers that myth can be more meaningful than truth. (1:37) **May 12, 16, 19**



The Bicycle Thief

Vittorio De Sica's Oscar-winning 1948 film uses ordinary people and Italian city streets to present the plight of a peasant family whose economic survival hinges on a bicycle and the work it provides. Father and son's fruitless search for the stolen bike ends with, as *Life* puts it, "the greatest movie wrench at the heartstrings since Charlie Chaplin in *The Kid*." (1:29) **May 19, 23, 26**



The Bride Wore Black

Director François Truffaut has had a professional love affair with Alfred Hitchcock since his early days as a film critic. From that liaison comes this film homage with Jeanne Moreau as a widow intent on murdering the five men responsible for her husband's death. It's still Truffaut, but a healthy dash of Hitchcock makes the blend absolutely chilling. (1:47) **May 26, June 2**



Thief of Paris

Director Louis Malle's 1967 film suggests that once ill, the criminal is incurable. A wealthy orphan, Jean Paul Belmondo grows bitter over his uncle's theft of his inheritance. He takes to being a perverse Robin Hood, doling out vigilante justice through second story heists. Even after getting back his lost fortune, Belmondo continues a career of crime. (1:59) **June 2**

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Mr. E from Tau Ceti

The hero in this science fiction cartoon feature is a miniature man from Tau Ceti, the star nearest to our solar system. He travels to Earth in his mini-sized space ship at the speed of light in the year 2010. This fantasy of what the world may be like 34 years from now was spun by director Bill Cayton and has been praised for its realistic, scientific detail. (1:05) **May 4,6,8**

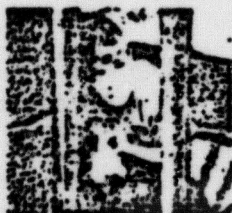


The Lupinek Case

A youngster with a knack for investigation gets a chance to prove his stuff when his classmates find their puppets are missing. The children search through the streets of their Swedish village, a greenhouse and even the garbage plant. Passions run high as frustration turns into suspicion. Clues confound the children and the viewer in this mite-size mystery. (0:52) **May 11,13**

Pinnocchio's Greatest Adventure

A combination of live action and animation gives a new twist to the traditional Pinnocchio story. The puppet's sixth birthday celebration is certainly no ordinary birthday party. Pinnocchio gets enchanted gifts, such as a magical story-mobile that makes fairy tales come alive. He visits the land of giants and witches, but the Wicked Wizard is out to spoil the party. (G-1:30) **May 18,20,22**



Doggie and Three

When a pesky pup named Pip "adopts" Tony, a care-free schoolboy, problems pop up all over. Tony's parents don't want him to have a pet and to keep Pip the boy must tell a complicated lie that even involves his schoolmaster. The antics of Tony and his soccer team friends to hold on to the dog rival the shenanigans of the famous Little Rascals. (0:52) **May 25,27, June 1**



The Little Bearkeepers

Three boys who help a zookeeper have something most children dream of—free run of a zoo. But then zoo officials decide to present a student group from Thailand with Bruno—the favorite cub of Pepi, the youngest boy. When the cubs accidentally escape, Pepi catches and hides Bruno. His struggle to care for the cub teaches him a lesson in growing up. (0:52) **June 1,3**



Art Carney in *Harry & Tonto*



George Segal in *Blume in Love*



Beyond the Door. A Faustian pact buys ten more years of life at a devilish rate of exchange. (R—1:38)
Blume in Love George Segal schemes to win back former wife Susan Anspach, who leaves when he brings home his secretary as well as his work. (R—1:55)
Dirty Mary, Crazy Larry Larry (Peter Fonda) extorts \$150,000 from a supermarket owner. Mary (Susan George) wants to come along for the ride. (PG—1:33)
The Front Page Jack Lemmon wants out of his hectic job as a newspaper reporter, but editor Walter Matthau will do anything to keep him in print. (PG—1:44)
Harry and Tonto Art Carney travels from coast to coast with his companion cat. He visits his daughter (Ellen Burstyn) and ends up with an Oscar. (R—1:56)
Huckleberry Finn Mark Twain's classic; with music. Jeff East as Huck and Harvey Korman. (G—1:54)
Magnum Force Clint Eastwood (*Dirty Harry*) once again takes matters into his own violent hands. (R—2:02)
Rafferty and the Gold Dust Twins The twins (Sally Kellerman and Mackenzie Phillips) kidnap Rafferty (Alan Arkin) for some fun, but not much profit. (R—1:31)
Report to the Commissioner Idealistic rookie cop (Michael Moriarty) is framed for murder. (PG—1:53)
Return of the Dragon. Bruce Lee in a tale of ferociously flying feet and fists. (R—1:32)
Ripped Off Boxer Robert Blake is framed with a murder, but Catherine Spaak is in his corner. (R—1:18)
Shoot It: Black, Shoot It: Blue! Cop Michael Moriarty is filmed cold-bloodedly killing a mugger. (R—1:33)
The Speed Merchants Mario Andretti in an under-the-hood look at sportscar racing. (G—1:35)
The Stepford Wives Katharine Ross and Paula Prentiss learn why their suburban friends act like living dolls: they've been replaced by robots. (PG—1:55)
The Terminal Man George Segal is the man with a computer in his brain to control unpredictable fits of rage. But the program doesn't compute. (PG—1:45)
The White Dawn Three men stranded in the Arctic must share the primitive life of the Eskimos. (PG—1:50)
The Yakuza Robert Mitchum must rescue war buddy Brian Keith's daughter from the grip of Japan's inscrutable underworld—the Yakuza. (R—1:52)

Jack Lemmon in *The Front Page*

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SATURDAY/1

1:30 Earthquake (PG—2:02)
4:00 Children's Special: Little Jungle Boy
5:30 Children's Special: Skinny and Fatty
6:30 Martha's Attic Bottlenose?
7:00 Young People's Film: The Space Explorers (1:00)
8:00 Saturday Night Movie: The Fortune (PG—1:28)
9:30 Rafferty and the Gold Dust Twins (R—1:31)
11:30 Earthquake (PG—2:02)

SUNDAY/2

1:30 Performing Arts Series: Black Music in America
2:00 The Pallisers Episode 26
3:00 Royal Flash (PG—1:39)
5:00 Soccer N.Y. vs. Chicago
7:00 Performing Arts Series: The Symphony Sound
7:30 The Voyage (PG—1:43)
9:30 Royal Flash (PG—1:39)
11:15 Jules and Jim (Subtitled—1:44)

MONDAY/3

1:30 Silence (G—1:31)
3:30 Young People's Film: Pippi Longstocking (G—1:30)
5:00 Pippi in the South Seas (G—1:39)
7:00 Performing Arts Special: Film, The Art of the Impossible
7:30 Family Feature: Silence (G—1:31)
9:30 American Film Theatre: Butley (2:10)
11:45 Return of the Dragon (R—1:32)

TUESDAY/4

1:30 Memory of Us (PG—1:34)
3:30 The Fortune (PG—1:28)
5:00 Martha's Attic Hands Up
6:30 Young People's Film: Mr. E from Tau Ceti (G—1:05)
7:00 Performing Arts Special: Movie Stuntmen
7:30 Memory of Us (PG—1:34)
9:30 The Fortune (PG—1:28)
11:00 The Speed Merchants (G—1:35)

WEDNESDAY/5

1:30 The Pallisers Episode 1
2:30 The White Dawn (PG—1:50)
4:30 Young People's Film: Pippi in the South Seas (G—1:39)
6:15 Paper Tiger (PG—1:41)
8:00 The White Dawn (PG—1:50)
10:00 World Team Tennis Indiana vs. Phoenix
12:30 Foreign Feature: Before the Revolution (Subtitled—1:50)

THURSDAY/6

1:30 The Pallisers Episode 2
2:30 The Fortune (PG—1:28)
4:00 Children's Special: Little Jungle Boy
5:30 Martha's Attic Hands Up
6:00 Young People's Film: Mr. E from Tau Ceti (G—1:05)
7:30 The Fortune (PG—1:28)
9:00 Les Folies Bergeres
11:00 American Film Theatre: Butley (2:10)

FRIDAY/7

1:30 The Pallisers Episode 1
2:30 Silence (G—1:31)
4:15 The Return of the Pink Panther (G—1:53)
6:15 Children's Special: The Incredible Cat Tale: Cecily
6:45 Family Feature: Silence (G—1:31)
8:30 Friday Night Movie: The Return of the Pink Panther (G—1:53)
10:30 Rafferty and the Gold Dust Twins (R—1:31)
12:05 Beyond the Door (R—1:38)



Peter Sellers in *The Return of the Pink Panther*

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SATURDAY/8

1:30 The Return of the Pink Panther (G—1:53)
3:30 Young People's Special: The Handy-Dandy-Do-It-Yourself Films
4:00 Young People's Film: The Undersea Explorers (1:22)
5:30 Martha's Attie Hands Up
6:00 Young People's Film: Mr. E from Ten Cents (G—1:08)
7:30 The Return of the Pink Panther (G—1:53)
9:30 The Yakuza (R—1:52)
11:30 Les Follies Bergeres
1:30 The Return of the Pink Panther (G—1:53)

SUNDAY/9

1:30 Dirty Mary, Crazy Larry (PG—1:33)
3:30 Paper Tiger (PG—1:41)
5:30 Family Feature: Jests (G—1:28)
7:00 Dirty Mary, Crazy Larry (PG—1:33)
9:00 American Film Theatre: Butley (2:10)
11:15 Foreign Feature: Before the Revolution (Subtitled—1:50)

MONDAY/10

1:30 Mr. Super Invisible (G—1:31)
3:30 Young People's Film: The Space Explorers (1:00)
4:30 Young People's Film: Robin Hood Part 1
6:00 Family Feature: Mr. Super Invisible (G—1:31)
7:35 Monday Night Movie: Brother, Can You Spare a Dime? (PG—1:46)
9:30 Harry and Tonto (R—1:58)
11:30 Brother, Can You Spare a Dime? (PG—1:46)

TUESDAY/11

1:30 The Pallisers Episode 2
2:30 The Return of the Pink Panther (G—1:53)
4:30 Memory of Me (PG—1:34)
6:30 Martha's Attie Masks and Magic
7:00 Young People's Film: The Lupinok Case (0:52)
8:00 The Return of the Pink Panther (G—1:53)
10:00 Brother, Can You Spare a Dime? (PG—1:46)
11:50 Shoot It Black, Shoot It Blue! (R—1:33)

WEDNESDAY/12

1:30 The Pallisers Episode 3
2:30 Brother, Can You Spare a Dime? (PG—1:46)
4:30 Young People's Film: Pippi Longstocking (G—1:30)
6:00 Brother, Can You Spare a Dime? (PG—1:46)
8:00 World Team Tennis Hawaii vs. Pittsburgh
10:30 Bertolucci Double Feature: Spider's Stratagem (Subtitled—1:37)
12:10 Before the Revolution (Subtitled—1:50)

THURSDAY/13

1:30 The Pallisers Episode 2
2:30 Dirty Mary, Crazy Larry (PG—1:33)
4:15 Mr. Super Invisible (G—1:31)
6:00 Martha's Attie Masks and Magic
6:30 Young People's Film: The Lupinok Case (0:52)
7:30 Family Feature: Mr. Super Invisible (G—1:31)
9:15 Dirty Mary, Crazy Larry (PG—1:33)
11:00 On Location: Rodney Dangerfield
12:00 Ripped Off (R—1:18)

FRIDAY/14

1:30 The Pallisers Episode 3
2:30 Paper Tiger (PG—1:41)
4:30 Children's Special: Yellow Slipper
5:30 Young People's Film: Robin Hood Part 1
7:00 Family Feature: Paper Tiger (PG—1:41)
9:00 Freddie Prinz and Friends
10:30 Shmo in Love (R—1:55)
12:30 Return of the Dragon (R—1:32)



Jack Nicholson in *The Fortune*

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SATURDAY/15

1:30 Young People's Film: Robin Hood Part 1
3:00 The Stepford Wives (PG—1:55)
4:55 The Speed Merchants (PG—1:35)
6:30 Martha's Attie Masks and Magic
7:00 The Stepford Wives (PG—1:55)
8:00 Magnum Force (R—2:02)
11:05 Freddie Prince and Friends
12:35 The Stepford Wives (PG—1:55)

SUNDAY/16

1:30 Family Feature: Silence (G—1:31)
2:10 Brother, Can You Spare a Dime? (PG—1:45)
5:00 Soccer Vancouver vs. San Jose
7:00 American Film Theatre: The Man in the Glass Booth (1:57)
8:00 Rafferty and the Gold Dust Twins (R—1:31)
10:45 Foreign Feature: The Spider's Stratagem (Subtitled—1:37)
12:25 Rafferty and the Gold Dust Twins (R—1:31)

MONDAY/17

1:30 The Great American Cowboy (PG—1:30)
3:00 Report to the Commissioner (PG—1:53)
5:00 Young People's Film: The Space Explorers (1:00)
6:00 Monday Night Movie: The Great American Cowboy (PG—1:30)
7:30 Report to the Commissioner (PG—1:53)
9:30 American Film Theatre: Sutley (2:10)
11:45 The Great American Cowboy (PG—1:30)

TUESDAY/18

1:30 The Pallisers Episode 3
2:30 The Terminal Man (PG—1:45)
5:00 Martha's Attie Animals Go to School Too
5:30 Young People's Film: Pinocchio's Greatest Adventure (G—1:30)
7:00 The Terminal Man (PG—1:45)
9:00 Freddie Prince and Friends
10:30 Magnum Force (R—2:02)
12:35 The Terminal Man (PG—1:45)

WEDNESDAY/19

1:30 The Pallisers Episode 4
2:30 The Bicycle Thief (Dubbed—1:29)
4:00 Young People's Film: Pippi in the South Seas (G—1:39)
6:00 Family Feature: Spots (G—1:26)
7:30 Foreign Feature: The Bicycle Thief (Dubbed—1:29)
9:00 The Spider's Stratagem (Subtitled—1:37)
11:00 World Team Tennis New York vs. Los Angeles

THURSDAY/20

1:30 The Pallisers Episode 3
2:30 Silence (G—1:31)
4:30 Young People's Film: Pinocchio's Greatest Adventure (G—1:30)
6:00 Martha's Attie Animals Go to School Too
6:30 Young People's Special: The Animals Are Crying
7:00 Family Feature: Silence (G—1:31)
9:00 Blume in Love (R—1:55)
11:00 Award Winning Short: Just Lather, That's All
11:30 Les Folies Bergeres

FRIDAY/21

1:30 The Pallisers Episode 4
2:30 Seven Alone (G—1:37)
4:30 Young People's Film: Robin Hood Part 2
6:00 The Great American Cowboy (PG—1:30)
7:30 Friday Night Movie: Seven Alone (G—1:37)
9:30 The Fortune (PG—1:26)
11:00 The Great American Cowboy (PG—1:30)
12:30 The Fortune (PG—1:26)



Natalie Wood in Peeper

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SATURDAY/22

1:30 Russian High School Basketball Stars vs. California HS Stars
3:30 Seven Alone (G—1:37)
5:30 Martha's Attie Animals Go to School Too
6:00 Young People's Film: Pinocchio's Greatest Adventure (G—1:37)
7:30 Seven Alone (G—1:37)
9:30 Royal Flash (PG—1:39)
11:15 Beyond the Door (R—1:38)
1:00 Royal Flash (PG—1:39)

SUNDAY/23

1:30 The Terminal Man (PG—1:45)
3:30 The Front Page (PG—1:44)
5:30 The Great American Cowboy (PG—1:30)
7:30 The Front Page (PG—1:44)
9:15 The Terminal Man (PG—1:45)
11:00 Return of the Dragon (R—1:32)
12:35 Foreign Feature: The Bicycle Thief (Subtitled—1:29)

MONDAY/24

1:30 Peeper (PG—1:27)
3:00 Mr. Super Invisible (G—1:31)
5:00 Young People's Film: Robin Hood Part 3
6:30 Family Feature: Mr. Super Invisible (G—1:31)
8:30 Monday Night Movie: Peeper (PG—1:27)
10:00 Monday Night Movie: Pardon My Bleep (R—1:22)
11:30 Project Kill (R—1:30)

TUESDAY/25

1:30 The Pallisers Episode 4
2:30 The White Dawn (PG—1:50)
4:30 Children's Special: Little Jungle Boy
6:00 Martha's Attie Folklore
8:30 Young People's Film: Doggie and Three (0:52)
7:30 Seven Alone (G—1:37)
9:15 The White Dawn (PG—1:50)
11:15 American Film Theatre: Butley (2:10)

WEDNESDAY/26

1:30 The Pallisers Episode 5
2:30 Spots (G—1:26)
4:00 The Bicycle Thief (Dubbed—1:29)
5:30 Young People's Film: The Space Explorers (1:00)
6:30 Family Feature: Spots (G—1:26)
8:00 World Team Tennis Phoenix vs. New York
10:30 Freddie Prince and Friends
12:00 Foreign Feature: The Bride Wore Black (Subtitled—1:47)

THURSDAY/27

1:30 The Pallisers Episode 4
2:30 Peeper (PG—1:27)
4:00 Young People's Film: Doggie and Three (0:52)
5:30 Martha's Attie Folklore
6:30 Family Feature: Mr. Super Invisible (G—1:31)
8:30 Peeper (PG—1:27)
10:00 The Yakuza (R—1:52)
12:00 Pardon My Bleep (R—1:22)

FRIDAY/28

1:30 The Pallisers Episode 5
2:30 The Great American Cowboy (PG—1:30)
4:00 Young People's Film: Robin Hood Part 3
5:30 Brother, Can You Spare a Dime? (PG—1:46)
7:30 The Great American Cowboy (PG—1:30)
9:00 Friday Night Movie: The Longest Yard (R—2:01)
11:05 Pardon My Bleep (R—1:22)
12:30 On Location: Rodney Dangerfield



Burt Reynolds in: The Longest Yard

EXHIBIT A - MAY 1976
HBO PROGRAM GUIDE
ANNEXED TO LEVIN
AFFIDAVIT

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SATURDAY/29

1:30 World Championship Karate from Madison Square Garden
3:00 Report to the Commissioner (PG—1:53)
5:00 Martha's Attic Folklore
5:30 Young People's Film: Robin Hood Part 3
7:00 Report to the Commissioner (PG—1:53)
9:00 The Longest Yard (R—2:01)
11:05 Freddie Prince and Friends
12:35 The Longest Yard (R—2:01)

SUNDAY/30

1:30 The Return of the Pink Panther (G—1:53)
3:30 The White Dawn (PG—1:50)
5:30 Peepers (PG—1:27)
7:00 The Return of the Pink Panther (G—1:53)
9:00 Peepers (PG—1:27)
10:30 The White Dawn (PG—1:50)
12:20 Pardon My Sneeze (R—1:22)

MONDAY/31

1:30 Huckleberry Finn (G—1:54)
3:30 The Great American Cowboy (PG—1:30)
5:00 The Stepford Wives (PG—1:55)
7:00 Huckleberry Finn (G—1:54)
9:00 Monday Night Movie: The Human Factor (R—1:31)
10:35 The Stepford Wives (PG—1:55)
12:30 The Great American Cowboy (PG—1:30)

TUESDAY/1

1:30 The Pallisers Episode 5
2:30 Mr. Super Invisible (G—1:31)
4:30 Young People's Film: Doggie and Three (0:52)
5:30 Martha's Attic Meeting King George and the Colonies
6:00 Young People's Film: The Little Bear Keepers (0:52)
7:00 Seven Alone (G—1:37)
9:00 The Longest Yard (R—2:01)
11:15 Seven Alone (G—1:37)

WEDNESDAY/2

1:30 The Pallisers Episode 6
2:30 Brother, Can You Spare a Dime? (PG—1:46)
4:30 Young People's Film: Robin Hood Part 4
6:00 Brother, Can You Spare a Dime? (PG—1:46)
8:00 World Team Tennis New York vs. Pittsburgh
10:30 Foreign Features: Thief of Paris (Subtitled—1:59)
12:30 The Bride Wore Black (Subtitled—1:47)

THURSDAY/3

1:30 The Pallisers Episode 5
2:30 Dirty Mary, Crazy Larry (PG—1:33)
4:30 Children's Special: Skinny and Patty
5:30 Martha's Attic Meeting King George and the Colonies
6:00 Young People's Film: The Little Bear Keepers (0:52)
7:00 Dirty Mary, Crazy Larry (PG—1:33)
9:00 The Human Factor (R—1:31)
10:45 Harry and Tonto (R—1:56)
12:45 The Human Factor (R—1:31)

FRIDAY/4

1:30 The Pallisers Episode 6
2:30 Mr. Super invisible (G—1:31)
4:15 Young People's Film: Robin Hood Part 4
5:45 Family Feature: Mr. Super Invisible (G—1:31)
7:30 Peepers (PG—1:27)
9:00 Friday Night Movie: Rollerball (R—2:03)
11:15 Peepers (PG—1:27)
12:45 Rollerball (R—2:03)



George Kennedy in *The Human Factor*

EXHIBIT A - MAY 1976
HBO PROGRAM GUIDE
ANNEXED TO LEVIN
AFFIDAVIT

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Patriarch Benjamin Lassiter

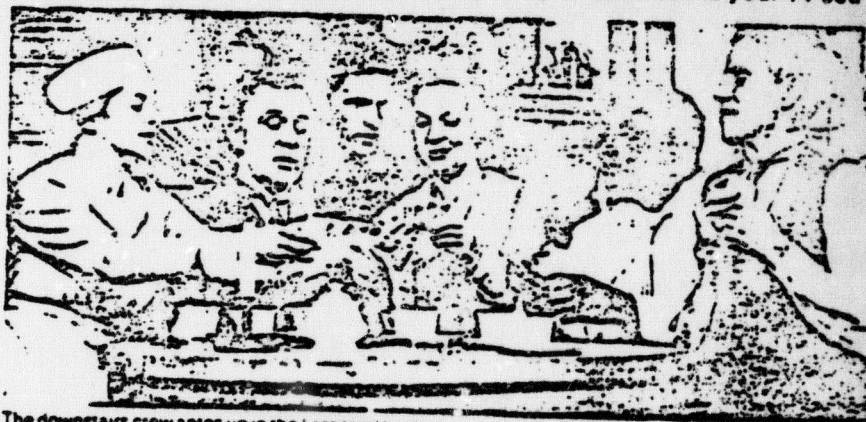


Rosamond and Robert Lassiter

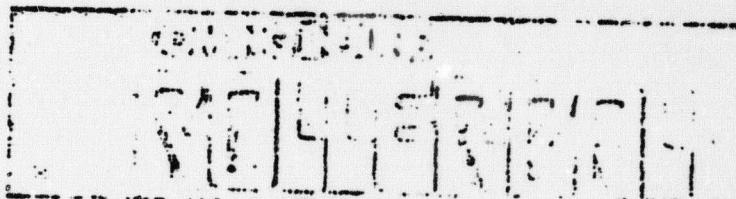
Time to talk back
to your TV set

**Beacon
Hill**

Should "Beacon Hill" have been taken off TV? Thousands of letters were sent in protesting the cancellation of the series last fall. The controversy raised by this question will serve as the basis for Home Box Office's first experiment in television democracy. Next month we will bring you the two unaired episodes of "Beacon Hill" that were created with the assistance of John Hawkesworth, producer of "Upstairs, Downstairs." We have no stake in this specific program. But we are vitally interested in the question it poses. You will have the chance to *directly and instantly* vote on the issue of whether "Beacon Hill" should be on TV. June's *On Air* will have full details on how you will get the unique opportunity to talk back to your TV set.



The downstairs crewantes up in the Lassiters' kitchen.



V1.2,3,4,5,6

KEY

Eastern Microwave Terrestrial
Transmission Services used by HHD

~~XXXXXXXXXX~~ ATCT Long-Lines used by HRO

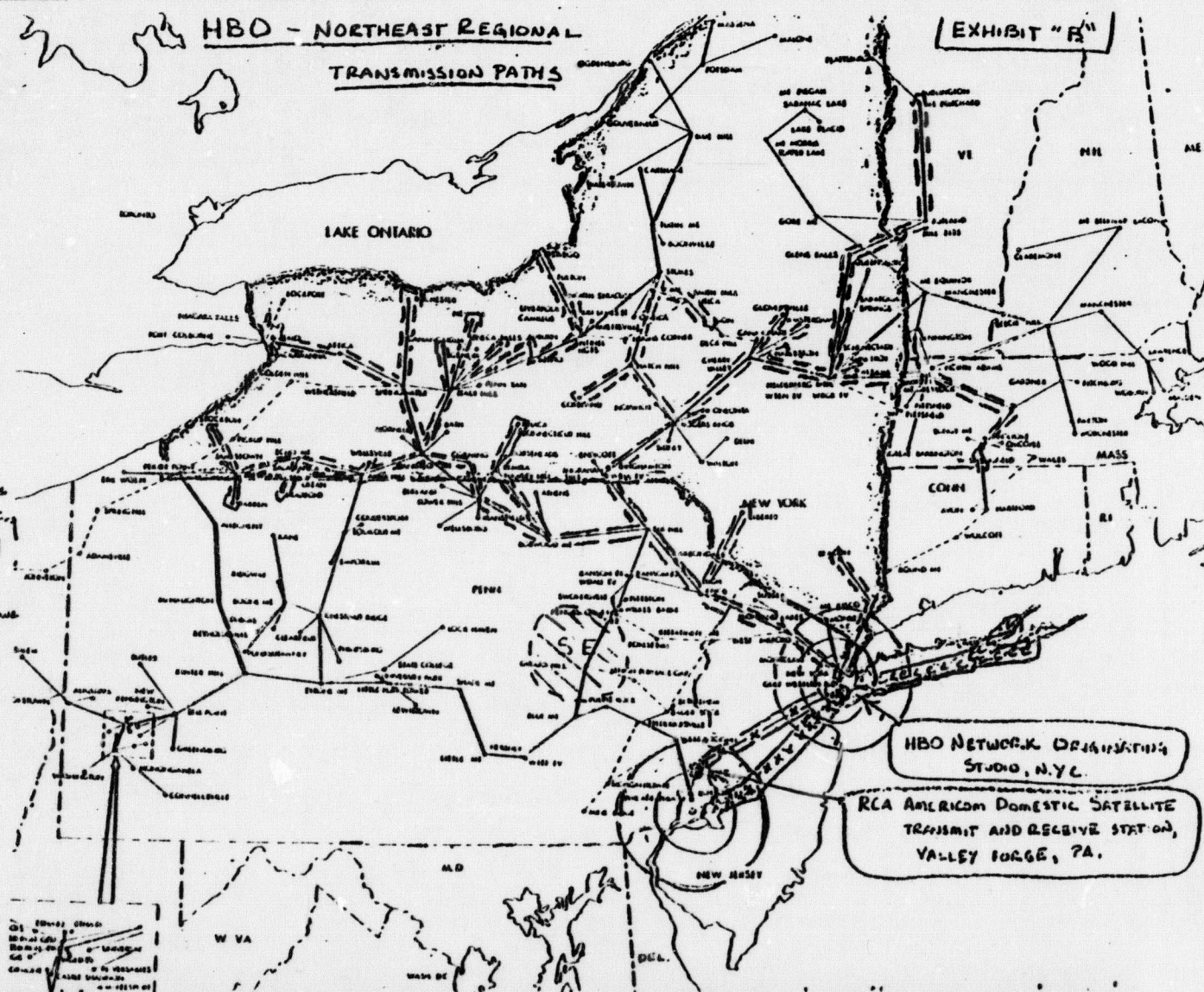
FCG-licensed Community Antenna
Relay Service transmission used
for HSD programming

Multi-point Distribution
Service Transmission
used by HSD

Area in which Televisual Microwave
Transmission Services for HBO Programming
are provided by Service Electric Company

RCA American Terrestrial Mammals
Transition Series

HBO - NORTHEAST REGIONAL
TRANSMISSION PATHS



HBO NETWORK DEFENDING
STUDIO, N.Y.C.

RCA AMERICAN DOMESTIC SATELLITE
TRANSMIT AND RECEIVE STATION,
VALLEY Forge, PA.

NOTICE OF CROSS-MOTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV, INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.; NATIONAL
CABLE TELEVISION ASSOCIATION, INC.;
NEW YORK STATE CABLE TELEVISION ASSOCIATION,
and HOME BOX OFFICE, INC.,

Plaintiffs,

76-CV-154

- against -

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD J.
WEGMAN, Commissioners of the NEW YORK
STATE COMMISSION ON CABLE TELEVISION,

Defendants.

CROSS-MOTION FOR SUMMARY JUDGMENT
PURSUANT TO FRCP, RULE 56

The defendants move the Court for summary judgment pursuant to FRCP, Rule 56, upon the summons and complaint herein, upon the answer herein, upon the affidavit of Kenneth J. Connolly, sworn to May 5, 1976 and upon all the papers and proceedings heretofore had.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendants
Office and P. O. Address
The Capitol
Albany, New York 12224

By 5/
KENNETH J. CONNOLLY
Principal Attorney
Telephone: (518) 474-3340

EXHIBIT B - INTERSTATE TRANSMISSION
PATH, ANNEXED TO LEVIN AFFIDAVIT

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ORIGINATING
N.Y.C.

ESTIC SATELLITE
RECEIVE STATION,
E, 7A.

NOTICE OF CROSS-MOTION

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NOTICE OF MOTION

TO:

DUGAN, LYONS, PENTAK, BROWN & TOBIN, ESQS.
Attorneys for Plaintiffs
Office and P. O. Address
100 State Street
Albany, New York 12207

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.
Attention: Robert S. Smith, Esq.
Attorneys for Plaintiffs
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345 Park Avenue
New York, New York 10022

ROBERT RADER, ESQ.
Attorney for Intervenor Federal Communications
Commission
Office and P. O. Address
Civil Division
Department of Justice
Washington, D.C. 20530

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Post Office and Courthouse, Syracuse, New York, on May 10, 1976, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

LOUIS J. LEFKOWITZ
Attorney General
Attorney for Defendants
Office and P. O. Address
The Capitol
Albany, New York 12224

By s/
KENNETH J. CONNOLLY
Principal Attorney
Telephone: (518) 474-3340

AFFIDAVIT IN SUPPORT OF CROSS-MOTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV, INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.; NATIONAL
CABLE TELEVISION ASSOCIATION, INC.;
NEW YORK STATE CABLE TELEVISION ASSOCIATION,
and HOME BOX OFFICE, INC.,

Plaintiffs, AFFIDAVIT 76-CV-154

- against -

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD J.
WEGMAN, Commissioners of the NEW YORK
STATE COMMISSION ON CABLE TELEVISION,

Defendants.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

KENNETH J. CONNOLLY, being duly sworn, deposes:

1. I am a Principal Attorney on the staff of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants herein. This affidavit, made in support of defendants' cross-motion for summary judgment and in opposition to plaintiffs' motion for summary judgment, is based upon personal knowledge of the facts, conversations with persons having knowledge of the facts and upon documents and records in my possession.

AFFIDAVIT IN SUPPORT OF CROSS-MOTION

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2. Essentially, this action challenges the Clarification of Commission Policy in Docket No. 90010 issued March 1, 1976. The Clarification requires cable television operators, which have established pay cable services, to file a formal notice with their respective municipalities and the New York State Commission on Cable Television. This formal notice must describe "the nature of their 'pay cable' services and the rates currently charged to subscribers for such services". (Clarification, pg. 7, par. 5.) Annexed hereto as Exhibit "1" is a copy of the Clarification of Commission Policy which is the subject of this action.

3. Plaintiffs claim that the Federal government, viz., the Federal Communications Commission, has preempted the entire field of regulation of pay cable.

4. Plaintiffs have relied upon various statements by the FCC in support of their position. However, plaintiffs are unable to cite any Federal regulation establishing the preemption which plaintiffs allege exists. The failure to cite a specific regulation is fatal to plaintiffs' action since no such regulation exists. The Clarification, therefore, is not in conflict with any Federal statute or regulation.

AFFIDAVIT IN SUPPORT OF CROSS-MOTION

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5. Also, no justiciable controversy exists to confer jurisdiction upon this Court pursuant to 28 U. S. C., section 2201. The Clarification issued by defendants does not regulate rates charged for pay cable and does not in any way conflict with a specific Federal statute or regulation.

6. Plaintiffs, National Cable Television Association, Inc., New York State Cable Television Association and Home Box Office, Inc., do not operate cable television systems, are not subject to or in any way adversely affected by the Clarification and those plaintiffs lack standing to maintain this action.

7. The remaining plaintiffs who are operators of cable television systems, all provide pay cable programming on their systems. These plaintiffs, with the exception of Warner Cable of Olean, Inc., have filed the statements required by the Clarification. No further action is required of these plaintiffs at this time. Therefore, as to these plaintiffs, this action is moot.

8. For the foregoing reasons, it is submitted that plaintiffs' motion for summary judgment on the first claim for relief should be denied and defendants' cross-motion for summary judgment should be granted.

s/ Kenneth J. Connolly
KENNETH J. CONNOLLY

Sworn to before me this

5th day of May, 1976.

THOMAS WEAD SANTORO
Notary Public, State of New York
Residing in Albany County
My Commission Expires March 30, 1977

Notary Public

EXHIBIT 1 - CLARIFICATION OF COMMISSION
POLICY, ANNEXED TO CONNOLLY AFFIDAVIT

COMMISSION ON CABLE TELEVISION
In the Matter of

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Rates Charged by Cable Television
Companies for "Auxiliary" Programming

) Docket No. 90010
)

CLARIFICATION OF COMMISSION POLICY
(Issued: March 1, 1976)

For the reasons hereafter described, we are today clarifying our policy regarding the regulation of subscriber rates for cable television services. In particular, we wish to make clear that Article 28 of the Executive Law requires that all rates charged to subscribers by cable television companies in New York must be specified in the cable television franchise held by the cable operator. This requirement applies not only to rates for such regular subscriber services as the transmission of television and radio broadcast signals and non-broadcast access and origination programming, but also to the rates for auxiliary programming such as that provided for an additional per-channel charge.

LEGAL CONTEXT

Section 825 of the Executive Law provides, in part, as follows:

1. Except as otherwise provided in this section, the rates charged by a cable television company shall be those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.
2. Such rates may not be changed except by amendment of the franchise.

Section 822 of the Executive Law provides, in part, as follows:

1. No transfer, renewal or amendment of any franchise . . . shall be effective without the prior approval of the commission.

Although these provisions, by their terms, apply to all rates charged by a cable television company, it has been the practice of many cable television companies to comply with Sections 822 and 825 with regard to their rates for "basic" subscriber services (i.e.,

Exhibit 1

EXHIBIT 1 - CLARIFICATION OF COMMISSION
POLICY, ANNEXED TO CONNOLLY AFFIDAVIT

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the transmission of television and radio broadcast signals and access and origination (programming) while avoiding these same provisions with regard to their rates for specialized programming sold to their subscribers on a per-channel basis. The extent of this practice is not now known with precision, but the growing popularity of the "Home Box Office" programming service has made the practice increasingly more widespread in recent years.*

The view that rates for subscription programming are excluded from the requirements of Section 825 is attributable to the Federal Communications Commission's position that state and local governments may not involve themselves in the regulation of subscriber rates for cable television services other than those described above as "regular" or "basic." See, e.g., paragraph 34 of the Clarification of Cable Television Rules, FCC 74-384, 46 FCC 2d 175, 29, RR 2d 1621 (1974); paragraph 216 of the First Report and Order in Docket Nos. 19554 and 18393, FCC 75-369, 52 FCC 2d 1, 33 RR 2d 367 (1975). The FCC asserts that it has lawfully pre-empted all regulation in this area pursuant to its authority under the supremacy clause of the United States Constitution** and its mandate to regulate broadcast communications under the Communications Act.*** This pre-emption it is argued, nullifies any law or franchise agreement to the contrary. The FCC's assertions in this matter have never been tested in a court of law.**** However, as a result of the FCC's position, many cable television companies and many municipalities in New York have been confused with regard to the authority of local governments to deal with the rates of "pay cable" services.

* In March 1973 only 16,100 subscribers in New York State received "pay cable" services. By November 1975 approximately 142,500 subscribers were receiving "pay" cable services. Of these, almost 139,000 were subscribers to the Home Box Office programming package.

** "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., art. VI, cl. 2.

*** Communications Act of 1934, as amended.

**** The United State Supreme Court has upheld the FCC's authority to regulate the field of cable television in a manner "ancillary" to its regulation of broadcasting. United States v. Midwest Video, 406 U.S. 649 (1972); United States v. Southwestern Cable, 392 U.S. 157 (1968). Neither of these cases dealt with the subject at hand and both pre-date the FCC's current cable regulations. In TV Pix, Inc. v. Maylor, 304 F. Supp. 459 (D.C. Nev., 1968), aff'd. per curiam, 396 U.S. 556 (1969), the FCC's right of pre-emption was supported, but this case, too, did not rule on the question of rate regulation.

EXHIBIT 1 - CLARIFICATION OF COMMISSION
POLICY, ANNEXED TO CONNOLLY AFFIDAVIT

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EARLY COMMISSION ACTIVITY

The problem of "pay cable" regulation is not a new one. In September, 1973, TelePrompter County Cable TV Corporation ("TPT") attempted to establish subscriber rates for Home Box Office service at Mount Vernon, New York. Following applicable law, it sought to do so by means of an amendment to its franchise and approval of that amendment from us. TPT's application was opposed by a number of motion picture theatre associations in connection with their requests for rule making in the general area of "pay" programming.* TPT subsequently withdrew its application, claiming that the FCC pre-emption relieved it of the requirement of local or State approval of "pay cable" rates.

On October 1, 1973, we obtained an Order from the Supreme Court Albany County, restraining TelePrompter from imposing any charge for subscription programming in Mount Vernon until we had approved such charge in accordance with the requirements of Sections 822 and 825 of the Executive Law. TelePrompter thereafter requested once again that we approve its "pay cable" rate, and, on October 19, 1973 we granted such approval.**

On the day we issued our Order in TelePrompter, October 19, 1973, we also issued a Statement of Policy regarding "Rates charged by Cable Television Companies for Subscription Programming." In that statement, we indicated our recognition of the problems presented in this area and we reasserted our authority, pursuant to Sections 822 and 825 of the Executive Law, to require franchise amendments and our approval for the establishment or modification of any subscriber rates. Although we did not grant the theatre owners' requests for stricter regulation of "pay cable" programming, we did require that all cable television companies which engaged in or proposed to engage in "pay" cable programming services notify us:

(1) of the material facts concerning each such existing or proposed operation. . . and

(2) that it will promptly, and with due diligence take whatever measures are necessary to satisfy the requirements of Sections 822 and 825 of the Executive Law.

* Note petitions of National Association of Theatre Owners, Inc. (NATO), the Metropolitan Motion Picture Theatre Association and the New York Chapter of NATO.

** TelePrompter County Cable TV, Order Approving Franchise Amendment Subject to Conditions, October 19, 1973

EXHIBIT 1 - CLARIFICATION OF COMMISSION
POLICY, ANNEXED TO CONNOLLY AFFIDAVIT

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In early 1974, we adopted revised rules concerning franchising procedures and franchise standards (9 NYCRR Parts 594 and 595). Section 595.1(a) of our Rules states that a franchise will be confirmed by the commission only if it contains:

A provision setting forth with specificity all rates to be charged by the franchisee for any aspect of cable television service, or a provision certifying that the municipality and the franchisee are unable to agree upon the rate or rates to be charged and specifying that said rate(s) shall be determined by the Commission on Cable Television pursuant to section 825(5)(e) of the Executive Law. (fn.)

Typically, rates are specified with respect to such matters as installation of first service connection; installation of additional connections on same premises; basic monthly service for first connection; basic monthly service for additional connections; subscription channel or channels; converters; use of leased channel or channels; and bulk service to hotels, motels, and others similarly situated. (emphasis added).

RECENT DEVELOPMENTS

Despite the foregoing, no specific actions were taken on our part to force "pay cable" services into the context of local franchises. At that time the extent of "pay cable" in New York was not great and, even with the TelePrommex (Mr. Vernon) decision, a policy of strict enforcement did not appear necessary. We were sympathetic to the generally accepted policy of allowing the cable television industry to develop its "auxiliary" services without hindrance, and were, therefore, reluctant to impose the strict requirements of Sections 822 and 825 upon cable operations and municipalities which had themselves established working understandings regarding the development of "pay cable" services.

We remain sympathetic to the notion of free growth in the field of "auxiliary" cable services. However, the results of such development since the initiation of pay cable, and the failure of many cable operations to comply with our filing requirements, have indicated that our jurisdiction in this area, and the obligations of the

EXHIBIT 1 - CLARIFICATION OF COMMISSION
POLICY, ANNEXED TO CONNOLLY AFFIDAVIT

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Executive Law and our Rules in this regard, must be reaffirmed with a new degree of certainty.

It is now evident that the message contained in our TelePromp-Ter Order of October 19, 1978 and our Statement of Policy was not understood clearly by a large number of cable television companies and municipalities in New York. Moreover, the confusion and misapprehension expressed by these companies and municipalities have not been resolved in the time since those actions were taken. Late circumstances indicate that the implications of these developments have become increasingly more serious.

Within the past year several cable television companies have unilaterally raised their "pay" rates immediately after they were denied similar increases in their "regular" rates by their respective franchisors.* Some companies have used the institution of Home Box Office service as an offer in negotiation, quid pro quo, for increases in their regular rates.** It has been alleged in recent months that, in some localities, cable television companies have refused to initiate Home Box Office programming in punitive retaliation for the actions of their franchisors regarding "regular" rates.*** In other instances, companies have negotiated with their franchisors regarding "pay cable" rates and then have informed the Commission that resulting franchise provisions have no effect due to FCC pre-emption of subscription programming.****

As the provision of Home Box Office Service has become increasingly widespread, many cable television companies have instituted this service and established subscriber rates therefor without specifying those rates in their local franchises.

DISCUSSION AND CONCLUSIONS

The position of this agency regarding the regulation of subscriber rates for all types of cable television services should never have been doubted by cable operators or municipal officials. The language of the Executive Law and our Rules clearly require all subscriber rates to be established or modified only through the

* Holm, e.g., Community Development Long Island Corporation at Syosset Bay.

** Holm, e.g., TelePrompTer Corporation at New Windsor and Cornwall.

*** See letter from Pamela M. Farr, Supervisor, Town of Big Flats regarding TelePrompTer Cable TV, Inc.

**** E.A., People's Cable at Pittsford.

local franchise and with our approval. Our October 19, 1973 pronouncements reiterated this position and made it clear that "pay cable" services were not excluded.

The sole basis for any contrary conclusion is the FCC's purported pre-emption of the field. However, our actions must be guided by our clear statutory mandate until such time as a court of competent jurisdiction has ruled that the FCC has, in fact, duly limited that statutory mandate. No court has yet so ruled, and the actions of the State Supreme Court in the TelePrompTer case, referred to above, indicate support for our position.

Not only do we fail to agree with the legality of the FCC's pre-emptive policy; we also question its wisdom. An examination of rate structures and developments in the establishment of subscriber rates has made it evident that a complicated nexus exists between those rates charged for "regular" cable services and those charged for "auxiliary" services. Municipalities are still unsure as to their jurisdiction concerning "pay cable". Moreover, clear instances of abuse resulting from this uncertainty have become evident, as cited above. If the present trend continues, municipalities will have less and less control over subscriber rates as a result of unilateral increases in the premium programming rate rather than the basic rate. For practical purposes, neither the locality nor the State would have control over the price subscribers pay for any cable television services.

The nature of per-channel or other types of specialized cable programming charges may require a distinctive regulatory approach. It may not always be desirable or necessary to regulate "pay cable" subscriber rates without regard to the nature of the locality involved. However, whatever actions are appropriate or may be taken with regard to the regulation of subscriber rates, the public interest requires that all such rates must be approached on an equal jurisdictional basis and that the requirements of applicable statutory law be met.

In view of the above, we wish to make clear that the following policies are consistent with the public interest and may be considered applicable in this matter.

EXHIBIT 1 - CLARIFICATION OF COMMISSION
POLICY, ANNEXED TO CONNOLLY AFFIDAVIT

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1. All subscriber rates imposed by cable television companies in New York must be authorized by the local franchise held by such companies, as required by Section 325 of the Executive Law.

2. No change in subscriber rates may be adopted without an appropriate amendment of the governing franchise.

3. Any such franchise amendment must be approved by this Commission before it may be effective, as provided in Section 322 of the Executive Law.

4. No exclusion or exemption from the above is provided by State law for rates for any "pay", "auxiliary" or "subscription" cable service.

5. Cable television companies that have already established "pay cable" services without following the appropriate legal requirements, as described above, will not be required at this time to make immediate efforts to amend their respective franchises. Such companies must however, file a formal notice with their respective municipalities and this Commission, within the next two months, describing the nature of their "pay cable" services and the rates currently charged to subscribers for such services. Those cable television companies providing "pay cable" services and not so on record with their respective municipalities and this Commission by April 30, 1976, will face appropriate sanctions.

6. Active enforcement of these policies will be undertaken.

It should be noted that concern has been expressed regarding the effect of the above policies on various special aspects of the "pay cable" market. At this time the market is, by and large, limited to per-channel specialty services providing a standard variety of home entertainment programming (generally represented by the monthly packages provided by Home Box Office). We will remain open to applications for any appropriate modification of our policies, as expressed above, should the development of particular variations of "pay cable" services indicate such modifications.

COMMISSIONERS PARTICIPATING: Robert F. Kelly, Chairman;
Jerry A. Danzig, Vice-Chairman; Michael H. Prendergast
Eli Wager, Edward J. Wegman, Commissioners.

REPLY AFFIDAVIT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
BROOKHAVEN CABLE TV, INC., et al.,

Plaintiffs,

-against-

ROBERT F. KELLY, Chairman, et al.

Defendants,

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Intervenors.
-----X

Civil Action No.
76-Cv.-154

REPLY AFFIDAVIT OF
BRUCE P. SAWYER

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BRUCE P. SAWYER, being duly sworn, states:

1. I am Executive Vice President of plaintiff Home Box Office, Inc. ("HBO"). I submit this reply affidavit in support of plaintiffs' motion for summary judgment in order to answer the claim of the New York State Cable Commission ("New York Commission") that its price control policy has no practical impact and is thus not ripe for judicial review. I will show herein that the attempt of the New York Commission to regulate the prices charged for movies, sports and other special events offered by pay cable -- in direct contravention of the FCC's prohibition of such regulation -- works a direct, immediate and substantial hardship upon HBO, cable television systems and the viewing public. The conflict between the federal and state policies has created a cloud of uncertainty which is retarding the development of pay cable in New York. Prompt judicial resolution of this conflict is important.

REPLY AFFIDAVIT

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2. HBO is a national pay cable television network, in certain ways similar in concept to a broadcast network like CBS or NBC, which provides more than 80 hours of diversified programming each week to its affiliates, which are cable television systems in New York State and elsewhere in various parts of the nation. HBO's affiliates offer these programs to the public at a fraction of their regular box-office price. New York City, I am informed, has recently filed an amicus brief herein supporting the concept of free-market pricing. HBO typically receives a percentage (subject to a minimum payment) of the revenues which its affiliates receive from the approximately 30% or so of the affiliates' subscribers who generally elect to receive pay cable programming. Thus, price controls by various localities and the New York Commission would have an impact on HBO's revenues. New York is the only State which has introduced the notion of price controls.

3. The New York Commission's price control rule and the uncertainty created by the clash between the federal and state policies have stopped the growth of pay cable in New York. Since the New York Commission announced its policy on March 1, 1976, HBO has found that it is virtually impossible to obtain new affiliates in New York State. Cable television system operators are understandably reluctant to go forward with pay cable in the present regulatory climate of controlled prices and uncertainty. Despite HBO's continuing effort, HBO has met with little success in its attempt to recruit new affiliates in New York.

4. Specifically, cable television systems in Buffalo, Auburn, Catskill, Dansville, Dunkirk, Niagara Falls, Poughkeepsie, Queensbury, Salamanca and Watertown were negotiating

REPLY AFFIDAVIT

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to obtain HBO programming earlier this year -- programs which the public in those communities wanted. Each of those companies abandoned or postponed its plans to bring pay cable to its community after the promulgation of price-regulation rules by the New York Commission. It is significant that the owners of cable television systems in Dunkirk and Salamanca, who own cable television systems in Maine, Massachusetts and Pennsylvania, have proceeded with plans to introduce pay cable programming to the public in those States but not in New York.

5. Aside from halting HBO's ability to launch new pay cable services in New York, the New York Commission's price control policy will have an inhibiting impact on HBO's plans in the programming area. HBO has been striving to bring to the public a variety of desirable programs and is continually attempting to obtain rights to outstanding events, often at substantial costs and commitments. For example, HBO has recently offered "block-buster" motion pictures such as "Gone With The Wind" and "Towering Inferno" as part of its regular service, although it had to pay exceptionally high license fees for those attractions. Similarly, HBO has been incurring substantial expenses in developing its own innovative programming and co-operating in the development of a series of live performances called "On Location", featuring outstanding performers (such as Les Pollies Bergere, Bette Midler, David Steinberg and Robert Klein), all at substantial expense. HBO is also offering quality series programs such as "The Pallisers" (a BBC series) and episodes of "Beacon Hill" never shown on CBS. In addition, HBO

REPLY AFFIDAVIT

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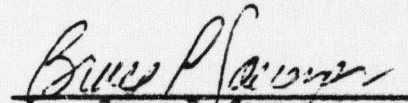
makes substantial long-term commitments for comprehensive sports programming from Madison Square Garden and the Los Angeles Forum. HBO is constantly exploring and negotiating with new program sources and expects to be able to offer events from outstanding cultural institutions. At the same time, HBO is considering plans for additional channels of subscription programming geared to discrete tastes of particular segments of the public. HBO is willing to undertake all of the foregoing risks and expenses if it is permitted to experiment in a free-market environment -- like all other competitive communications media such as television, movie theaters, concert halls, sports arenas, over-the-air pay television and video discs, all of whose prices are set by the market place rather than bureaucratic fiat. But under present circumstances in New York, HBO is no longer assured of a free-market environment. Unless this cloud is removed, the infant pay cable industry will be retarded in its ability to make the commitments necessary to bring to the public the full range of potential services and programs. This situation is extreme because HBO operates a national network with approximately 161 cable television affiliates located in thirty-one states serving more than 400,000 subscribers. And it is expanding its service to new subscribers across the nation, in large part via satellite. But HBO cannot effectively operate, and make future plans for, a national network if prices for programs are subject to the chaos and uncertainties of regulatory schemes and political pressures in hundreds of localities throughout the nation. Like its competitors and like other new communications media, HBO merely wants the right to compete in a free marketplace.

REPLY AFFIDAVIT

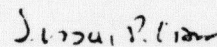
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6. In this connection, the FCC, recently reaffirming its prohibition and preemption of rate regulation of pay cable, declared that different rate regulation by different localities and states "might unduly hamper the obviously interstate effort involved by cable operators and programmers to secure a large enough audience to make this new communications medium a viable economic success" (46 FCC2d 175, 185-86). The FCC added, quoting then Judge Warren Burger, that "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication" (29 FCC2d 1078, 1082).

7. For the foregoing reasons, HBO considers it a matter of urgent practical importance to obtain judicial review of the New York Commission's efforts to regulate pay cable prices as soon as possible. I, therefore, respectfully request that plaintiffs' motion for summary judgment be granted.


Bruce P. Sawyer

Sworn to before me this
11th day of June, 1976


Notary Public.
SUSAN P. CARR
Notary Public, State of New York
No. 31-5321936
Qualified in New York County
Commission Expires March 30, 1978

REPLY AFFIDAVIT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
BROOKHAVEN CABLE TV, INC., et al., :
Plaintiffs, :
-against- : Civil Action No.
ROBERT F. KELLY, Chairman, et al., : 76-CV-154
Defendants, : REPLY AFFIDAVIT OF
FEDERAL COMMUNICATIONS COMMISSION : STUART ROBINOWITZ
and UNITED STATES OF AMERICA, :
Intervenors. :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STUART ROBINOWITZ, being duly sworn, states:

1. I am a member of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for plaintiffs. I submit this affidavit in support of plaintiffs' summary judgment motion and in opposition to defendants' cross motion for summary judgment. The purpose of this affidavit is to put before the Court the chronology preceding the Clarification of Policy of the New York State Commission on Cable Television ("State Commission"), dated March 1, 1976, being challenged herein.

2. In October 1973, the State Commission issued a Policy Statement (Exhibit A hereto) declaring its intention to regulate the prices for movies, sports, special events and other programs offered by pay cable. In reaction, various cable television companies (including the parent companies of many of the plaintiffs) filed comments with the State Commission asserting

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that its proposed price-control policy was invalid because the FCC had prohibited and preempted such regulation. The State Commission thereafter did not enforce its Policy Statement: it lay fallow for almost three years.

3. Shortly after issuing the October 1973 Policy Statement, the State Commission's then General Counsel, Joel Yohalem, gave the following testimony in the course of extensive rule-making proceedings before the FCC concerning pay cable (FCC Docket No. 19554):

"What I want to emphasize is we are not really trying to throw a monkey wrench into pay cable nor trying to interfere with your jurisdiction over pay cable. The issue was brought to a head in our state. We are not ready to acquiesce in Federal preemption of our statutory authority at this point, but we are not looking for a fight either, and we hope we can work out some reasonable accommodation." (Tr. 618)

In April 1975, at the conclusion of the aforesaid FCC hearings on pay cable, the FCC issued a Report and Order which, inter alia, reemphasized the FCC's long-standing policy of prohibiting the regulation of prices for movies, sports and other programs offered via pay cable and also via over-the-air pay television--two new media which were to be treated on an equal basis. The FCC concluded, pursuant to its statutory mandate of free competition, that prices should be set by free marketplace forces, not bureaucratic agencies, as these new communications media seek to develop. (The relevant language from the FCC's 1975 Report and Order is set forth in our principal memorandum at 7.) The New York State Commission did not appeal from the FCC's 1975 Report and Order.

4. On January 27, 1976, the State Commission filed Comments with the FCC in reply to its Notice of Rule Making in Docket 20681 concerning franchising procedures. The State Commission stated:

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"...we note that the Notice in this docket ...reiterates the FCC's oft-stated policy of pre-empting and prohibiting regulation of auxiliary services such as pay-cable. . . While CCT [the State Commission] questions the Commission's statutory jurisdiction to pre-empt and prohibit regulation of rates for auxiliary services, we have not challenged that pre-emption in view of our shared belief that rates for auxiliary services should not now be regulated."

However, the State Commission added that it was then "rethinking" its views.

5. That rethinking process apparently ended a month later, when the State Commission issued its March 1, 1976 Clarification of Policy announcing the agency's intention to control the prices for movies, sports and other special events offered via pay cable. The Clarification states that the State Commission will undertake "[a]ctive enforcement" of its price control policies and expressly contemplates a court test of whether those policies are lawful. In short, the Clarification of Policy reflects the firm decision of the State Commission, after long consideration, to act in defiance of the FCC's orders preempting state and local regulation of pay cable prices. I respectfully submit that this clash between federal and state policies is in every way ripe for judicial review.

6. The State Commission also claims that the controversy has become "moot" because four of the five plaintiff cable companies have filed letters informing the Commission of their current prices--prices which are a matter of common knowledge in the trade. But such letters all state:

"This filing is made under protest. We regard any state or local regulation of pay cable television rates as invalid, for the reasons asserted in a lawsuit entitled Brookhaven Cable Television Inc. v. Kelly, pending in the United States District Court for the Northern District of New York. The validity of such regulation is being tested in that lawsuit."

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Those letters, as explained in our reply brief, do not "moot" the controversy.

Stuart Robinowitz
Stuart Robinowitz

Sworn to before me this

1st day of June, 1976.

Joyce S. Flederman
Notary Public

JOYCE S. FLEDERMAN
Notary Public, State of New York
No. 31-6331140
- Qualified in New York County
- Commission Expires March 31, 1978

EXHIBIT A - STATEMENT OF POLICY
ANNEXED TO ROBINOWITZ AFFIDAVIT

STATE OF NEW YORK

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COMMISSION ON CABLE TELEVISION

RECEIVED

OCT 23 1973

RONALD LIGHTSTONE

In the Matter of

Rates Charged By Cable Television Companies
for Subscription Programming

STATEMENT OF POLICY

(Issued: October 19, 1973)

Subdivisions 1 and 2 of Section 825 of the Executive Law provide as follows:

1. Except as otherwise provided in ~~this section~~, the rates charged by a cable television company shall be those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.

2. Such rates may not be changed except by amendment of the franchise.

Subdivision 1 of Section 822 of the Executive Law provides as follows:

No. . . amendment of any franchise. . .
shall be effective without the prior approval
of the commission. . . .

We have this day issued an order granting an application by TelePrompter County Cable TV Corporation for approval of a franchise amendment setting forth the rate at which subscription programming will be made available by TelePrompter in the City of Mt. Vernon. In the course of our review of the ~~TelePrompter application~~, it has come to our attention that other cable television companies in the state are either presently offering subscription programming for which a charge is made or intend to do so in the near future. In a number of instances of which we are aware, the franchises under which

EXHIBIT A - STATEMENT OF POLICY
ANNEXED TO ROBINOWITZ AFFIDAVIT

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these companies operate do not set forth the rate at which such programming is being, or will be, made available. Apparently, many cable television companies are either unaware of the requirements of Sections 822 and 825 or uncertain as to their applicability to the rates for subscription programming.

We have made clear in the TelePrompter case that we believe this Commission's jurisdiction under Sections 822 and 825 of the Executive Law extends to the rates for subscription programming offered by cable television companies.

In TelePrompter, we sought and obtained a judicial order prohibiting the company from charging for subscription programming prior to Commission approval of a franchise amendment specifying the rate for such service. However, the circumstances of that case were, in our view, quite unique,* and we have concluded that the public interest would not be served by a similar approach in all cases. Accordingly, we will not, as a general matter, institute legal proceedings to enjoin cable television companies that are presently engaged in subscription programming, or that are planning to engage in such programming prior to December 1, 1973, from charging for such programming if the cable television company notifies the Commission, in writing, by not later than October 29, 1973

(1) of the material facts concerning each such existing or proposed operation (including, at least, the name of the program supplier, the municipalities to be served, the rate for such service and the date service commenced or will commence and

(2) that it will promptly, and with due diligence, take whatever measures are necessary to satisfy the requirements of Sections 822 and 825 of the Executive Law.

* In TelePrompter, we were faced with a situation in which the company first applied for our approval of a franchise amendment and then withdrew the application, claiming "pre-emption," when we failed to take action in accordance with the company's apparent timetable. In these circumstances, there could be no basis for any claim that the company was unaware of the requirements of the statute. And, having initially resolved any uncertainty as to the applicability of these requirements in favor of Commission jurisdiction, the company's subsequent resort to the pre-emption argument had a somewhat hollow ring.

EXHIBIT A - STATEMENT OF POLICY
ANNEXED TO ROBINOWITZ AFFIDAVIT

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Cable television companies who avail themselves of this procedure will, of course, be expected to in fact use due diligence to satisfy these regulatory requirements. The Commission will review all Section 822 applications filed in accordance with this policy statement, and our disposition of those applications will be governed by the provisions of that section.

Any cable television company intending to engage in subscription programming as to which the notification procedure described above either is inapplicable or has not been followed, must comply with the requirements of Sections 822 and 825 prior to demanding, exacting, or collecting any charge for such programming.

Commissioners participating: Robert F. Kelly, Chairman; Jerry A. Danzig, Vice Chairman; Eli Wager, Edward J. Wegman, Michael H. Prendergast, Commissioners.

REPLY AFFIDAVIT

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UNITED STATES DISTRICT COURT.
NORTHERN DISTRICT OF NEW YORK

-----x
BROOKHAVEN CABLE TV, INC., et al., :
 :
 : Plaintiffs, :
 :
 : -against- : Civil Action
 : : No. 76-CV-154
 :
 : ROBERT F. KELLY, Chairman, et al., : REPLY AFFIDAVIT OF
 : : STUART FELDSTEIN
 :
 : Defendants, :
 :
 : FEDERAL COMMUNICATIONS COMMISSION :
 : and UNITED STATES OF AMERICA, :
 :
 : Intervenor. :
 :
 -----x

DISTRICT OF COLUMBIA) ss.:

STUART FELDSTEIN, being duly sworn, states:

1. I am Vice President and General Counsel of plaintiff National Cable Television Association, Inc. ("NCTA"), the principal trade association for the cable television industry in the United States, with more than 1,400 cable television system members having more than 6,000,000 subscribers. I submit this reply affidavit in support of plaintiffs' summary judgment motion and in opposition to defendants' cross summary judgment motion. I will show herein that New York State's cable television systems will suffer substantial, direct and immediate hardship from the price control policies announced by the New York State Commission on Cable Television ("State Commission"). The State Commission's Clarification of Policy challenged herein adversely affects all cable television systems in New York State and is ripe for review.

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2. There are approximately 163 cable television systems in New York State with approximately 800,000 subscribers. Today, only about 45 of those systems are offering the new pay programming service. Many NCTA members in New York wish to introduce this new program service. (Courier Cable Television, Inc., a Buffalo cable system, which seeks to intervene as a party plaintiff in this action, is one such member.) But under the State Commission's Policy, a cable television system not offering pay program service prior to March 1, 1976 cannot now do so, unless it obtains approval of its prices from its local franchising authority and the State Commission. That is a lengthy and uncertain process, as explained in Courier's moving papers. Because of the State Commission's rule and the uncertainties created by the conflict between the state agency and the FCC, many cable systems in New York have postponed or abandoned plans to introduce pay programs, as shown in the accompanying affidavit of Bruce P. Sawyer of Home Box Office. New York, the only state attempting to regulate pay program prices, has discouraged new entry into this field in the State, while pay services expand in other sections of the United States.

3. Those NCTA members who are already offering pay programs in New York are also adversely affected by the State Commission's price regulation policies. Cable and pay cable are new, high-risk and capital intensive industries. Cable system operators must commit substantial sums for long-term capital investment, enter into significant contractual commitments, and undertake extensive promotional and advertising efforts, all in the hope of earning a fair return over a period of years. Pay cable operators are giving consideration to expensive new forms of technology, including devices that would

REPLY AFFIDAVIT

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permit consumers to select programming on a program-by-program basis rather than paying a flat fee for a single channel of pay programs. Some pay cable entrepreneurs are also considering the prospect of instituting several different channels of pay programming in order to satisfy interests of different segments of the viewing public. Such plans for new technologies and services will be chilled by the regulatory atmosphere created in New York.

4. That is apparent in view of marketplace realities. Pay cable, still an infant medium, face vigorous competition from established media of communications whose prices are not regulated--such as commercial television, theatres, music halls, sports arenas and the like. In addition, pay cable faces competition from emerging media, such as over-the-air pay television and video discs offering similar programming. Those new media also operate without any price controls. A crucial factor to be considered by pay cable entrepreneurs in deciding whether to make investments and commitments in this field is whether the pay cable industry will be allowed to grow in a free marketplace like the media with which it must compete. Faced with the prospect of price controls imposed by a myriad of different government agencies, many cable operators will defer or abandon their plans and the growth of the cable and pay cable industries will be stunted. The lack of growth in New York, as noted above, has already taken place.

5. The Clarification will have other adverse effects. Pay cable pricing patterns have changed as this new technology has been tested in the marketplace and as additional amounts of high-quality and diverse programming are offered to the public. The diet of programs is continually being enriched, with HBO now offering more than 80 hours per week. Because pay cable

depends on programming with varying license fees, including unique sports events and certain "blockbuster" motion pictures such as "Gone With The Wind" and "Towering Inferno," this new communications medium--like all the entrenched ones--needs the freedom to experiment in pricing patterns. But under the Clarification, a pay cable company that wishes to change its prices would have to obtain an amendment to its local franchise and then approval of the State Commission.

6. The Clarification will have other immediate practical effects. Pay cable service is offered in many localities which are adjacent to other communities which have only the basic cable service. The pattern has been to expand pay service into these contiguous communities, which often have different franchising authorities. Under the State Commission's policy, every time a cable company seeks to expand pay service into a neighboring municipality with a separate franchising authority, it will be required to go through the cumbersome and uncertain process of obtaining local and State Commission approval of its prices. Thus, the Clarification of Policy is deterring such geographical expansion.

7. The Clarification will have other adverse impacts on NCTA member companies in New York. Cable systems engaged in pay operations presently offer a single channel of programming available for a flat monthly fee. That single channel contains movies, sports and other attractions. The present system of a single channel service for a flat fee was the simplest and most feasible way to launch this new technology. However, there have been tests in New York and elsewhere to offer consumers the right to select individual programs on a program-per-program basis. This will become a feasible alternative mode as the technology is perfected. Moreover, since cable television systems have an abundance of channels, many of which are now unused, it is also

REPLY AFFIDAVIT

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likely that there will be the development of different pay program services for different prices on different channels catering to diverse tastes of the viewing public (e.g., new movies, older films, cultural programs, sports, etc.). Any attempts to experiment with additional services will also be chilled by the scheme of price control set forth in the Clarification.

8. The policies of the New York agency affect, not only cable companies, but also local franchising authorities. That is illustrated by the City of Rochester's pending Request for a Declaratory Ruling before the FCC (CSR-967) seeking a declaration that many of the state agency's policies--including its effort to control prices for pay programs--are preempted by the FCC. In that request, Rochester states that conflicts between state and federal policy causes "frustrating delays for (1) cable operators seeking to construct their systems and (2) local cities and towns anxious to receive cable television service."

9. In short, the Clarification, contrary to defendants' brief, raises an important issue that requires prompt judicial review. NCTA's New York members are now faced with great uncertainty in operating existing pay cable systems, in making plans to expand those systems, and in making plans to institute new pay program services. The uncertainties created by the New York State Commission--the only state agency in the United States which has adopted such a price control scheme--will make cable television companies reluctant to operate in New York State until there has been a resolution of the conflicting policies enunciated by the FCC and the state agency.

10. Pay cable is a brand new communications technology in an early stage of growth, development and flux.

REPLY AFFIDAVIT

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The nature of the programs and services provided, the technology and the pricing patterns will continue to change as this new medium develops. In view of the embryonic nature of this new communications mode, the FCC correctly determined that pay cable--just like over-the-air pay television--should be allowed to grow free of artificial restraints and that program prices should be left to marketplace forces at this time. Indeed, the FCC's mandate is to promote free competition and not control prices, as shown in the landmark opinion in FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). The State Commission's action will have precisely the type of chilling and anti-competitive effect which the FCC sought to avoid.

11. The State Commission claims that NCTA lacks standing to sue because, unlike its members, the association is not subject to the price regulation scheme of the state agency. But, as explained in the accompanying reply brief, NCTA clearly has standing under well-established law. NCTA has regularly represented its members before the Courts, the Congress, the FCC, and other governmental bodies. NCTA's standing has never been challenged in any of the actions which it has brought on behalf of its members. National Cable Television Ass'n. v. U.S., 415 U.S. 336 (1974).

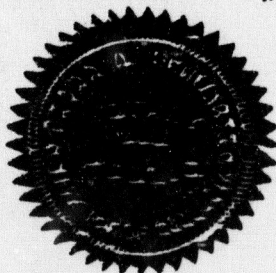
12. For the foregoing reasons, NCTA respectfully requests the Court to grant plaintiffs' summary judgment motion.

Sworn to before me this
day of June, 1976

Stuart Feldstein

Notary Public

My Commission Expires October 31, 1999



NOTICE OF MOTION

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV INC.;
CAPITOL CABLEVISION INC.;
SAMSON CABLEVISION CORP.;
TELEPROMPTER CABLE SYSTEMS, INC.,
WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIA-
TION, INC.; NEW YORK STATE CABLE
TELEVISION ASSOCIATION, and
HOME BOX OFFICE INC.,

Plaintiffs,

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATION COMMISSION

Intervenors-Plaintiff

s-

ROBERT F. Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD J.
WEGMAN, Commissioners of the NEW YORK
STATE COMMISSION ON CABLE TELEVISION,

Defendants.

CIVIL ACTION
NO. 76-CV-154

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that on May 24, 1976, at ten o'clock
in the forenoon, or as soon thereafter as counsel can be heard,
in the United States District Court, Federal Building, Utica,
New York, application and motion will be made to this Court for
an Order granting the Federal Communications Commission and
United States of America leave to intervene pursuant to Rule
24(a)(2) Federal Rules of Civil Procedure or, in the alternative,
intervention pursuant to Rule 24(b)(2) Federal Rules of Civil
Procedure.

Dated: May 13, 1976
Syracuse, New York

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Attorney for Intervenors-Plaintiff
United States of America
Federal Building, PO Box 1258
Syracuse, New York 13201
Tel: 315-473-6660

cc:
Assistant U. S. Attorney

NOTICE OF MOTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV INC.;
CAPITOL CABLEVISION INC.;
SAMSON CABLEVISION CORP.;
TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIA-
TION, INC.; NEW YORK STATE CABLE
TELEVISION ASSOCIATION, and
HOME BOX OFFICE INC.,

Plaintiffs,

Civil Action No. 76 CV 154-

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Plaintiff-Intervenors

-against-

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD J.
WEGMAN, Commissioners of the NEW YORK
STATE COMMISSION ON CABLE TELEVISION,

Defendants.

MOTION FOR LEAVE TO INTERVENE AS PARTIES PLAINTIFF

The United States of America and the Federal Communications Commission, by their undersigned counsel, hereby move this Court for an Order granting leave to intervene of right in this action as parties plaintiff pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, the United States of America and the Federal Communications Commission seek permissive intervention pursuant to Rule 24(b)(2), Federal Rules of Civil Procedure.

As grounds for this Motion, the proposed intervenors state that this is an action brought to challenge the authority of the New York State Commission on Cable Television to regulate pay cable television rates; that plaintiffs

NOTICE OF MOTION

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have asserted in their Complaint the claim that regulation of pay cable rates has been pre-empted by the Federal Communications Commission; and that the proposed intervenors seek leave to participate in the action and to advance the position that regulation of pay cable rates by the Federal Communications Commission under the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq., pre-empts State regulation of pay cable rates by virtue of the Supremacy Clause of Article VI, United States Constitution. Thus, the proposed intervenors claim an interest relating to the subject matter of the action, disposition may impair or impede the protection of that interest, the interest is not adequately represented by the existing parties, and the proposed intervenor's claim has a question of law common to the main action. The Court is respectfully referred to the Complaint in Intervention and Memorandum of Points and Authorities in Support of Motion by United States of America and Federal Communications Commission for Leave to Intervene as Parties Plaintiff, filed herewith in support of this Motion.

The undersigned attorneys for proposed intervenors have been authorized by counsel for plaintiffs and defendants to state that no party objects to the proposed intervention.

Upon the Court granting to the United States and Federal Communications Commission leave to intervene, intervenors will promptly file a Motion for Summary Judgment with supporting affidavit and memorandum of law. Because a hearing on plaintiffs' Motion for Summary Judgment and defendants' Cross-Motion for Summary Judgment is presently scheduled for May 24, 1976, the proposed intervenors will also seek leave to file their Motion and papers within the

NOTICE OF MOTION

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ten-day limit specified by Rule 56(c), Federal Rules of Civil Procedure, for the filing of a Motion for Summary Judgment.

Respectfully submitted,

OF COUNSEL:

Aston R. Hardy
General Counsel

Daniel M. Armstrong
Associate General Counsel

J. Tullos Wells
Counsel

Henry C. Bowen
Counsel

REX E. LEE
Assistant Attorney General

United States Attorney

Assistant United States Attorney

DAVID J. ANDERSON

ROBERT M. RADER

Attorneys Department of Justice
Attorneys for Plaintiff-Intervenors
Washington, D. C. 20530
Tel: 739-3374

PLAINTIFF-INTERVENORS' CROSS-MOTION AND OPPOSITION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV, INC., et al.,

Plaintiffs,

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION,

Plaintiff-Intervenors,

v.

Civil Action No. 76-CV-154

ROBERT F. KELLY, Chairman, et al.,

Defendants.

PLAINTIFF-INTERVENORS' CROSS-MOTION FOR
SUMMARY JUDGMENT AND OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff-intervenors United States of America and Federal Communications Commission, by their undersigned attorneys, hereby oppose defendants' Motion for Summary Judgment and move for entry of summary judgment in their favor pursuant to Rule 56, Federal Rules of Civil Procedure. The grounds for this Cross-Motion and Opposition are that the pleadings and affidavits of record demonstrate that there is no genuine issue as to any material fact and that plaintiff-intervenors are entitled to judgment as a matter of law, because the orders, decisions and policy of the Federal Communications Commission pursuant to the Communications Act of 1934 clearly demonstrate that the United States, through the Commission, has preempted the area of pay cable rate regulation, and further, because Sections 822 and 825, Article 28, New York Executive Law (McKinney's 1975)

PLAINTIFF-INTERVENORS' CROSS-MOTION AND OPPOSITION

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are facially inconsistent and conflict with the superceding orders, decisions and policy of the Federal Communications Commission.

In support of plaintiff-intervenors' Opposition and Cross-Motion for Summary Judgment, the Court is respectfully referred to the Affidavit of James R. Hobson, Acting Chief of the Cable Television Bureau, Federal Communications Commission, attached hereto. The Court is also respectfully referred to the Memorandum of Points and Authorities in Support of Plaintiff-Intervenors' Cross-Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, filed herewith.

Respectfully submitted,

OF COUNSEL:

Ashton R. Hardy
General Counsel

Daniel M. Armstrong
Associate General Counsel

J. Tullos Wells
Counsel

Henry C. Bowen
Counsel

Federal Communications
Commission
Washington, D.C. 20554

REX E. LEE
Assistant Attorney General

United States Attorney

Assistant United States Attorney

DAVID J. ANDERSON

ROBERT M. RADER

Attorneys, Department of Justice
Attorneys for Plaintiff-Intervenors
Washington, D.C. 20530
Tel: 739-3374

AFFIDAVIT IN SUPPORT OF CROSS-MOTION AND OPPOSITION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV INC.' CAPITOL
CABLEVISION INC.' SAMSON CABLEVISION
CORP.' WARNER CABLE OF OLEAN, INC., ;
NATIONAL CABLE TELEVISION ASSOCIATION,
INC.' NEW YORK STATE CABLE TELEVISION
ASSOCIATION; and HOME BOX OFFICE.,

Civil Action
No. 76 CV 154

Plaintiffs,

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Plaintiffs,

-against-

AFFIDAVIT

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PENDERGAST; ELI WAGER; and EDWARD
J. WEGMAN, Commissioners of the
NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants.

City of Washington
District of Columbia ss:

James R. Hobson, Being sworn states:

1. I am Acting Chief of the Cable Television Bureau
of the Federal Communications Commission ("Commission"),
with responsibility for the initiation and implementation of
Commission policy in the area of cable television. I have
also been involved in cable matters while serving as
special assistant to the Chairman of the Commission.

2. The Commission's policy regarding pay cable is the
product of exhaustive study of the pay programming area
first begun in 1955 with a Notice of Proposed Rulemaking,
20 F.R. 988 (1955) inviting comments to determine whether
the public interest would be served by adopting rules
authorizing television stations to transmit programs paid
for on a subscription basis. Several thousands of pages

AFFIDAVIT IN SUPPORT OF CROSS-MOTION AND OPPOSITION
of testimony and research involved in numerous Commission¹⁰⁰
rule-makings and policy statements over the past two
decades have brought the Commission to its decision
regarding the need for federal preemption of pay cable
operation and rate regulation. In adopting the policy of
preemption of local regulation of pay cable operations and
rates, the Commission was continuing a policy it had first
adopted with respect to the provisions for over-the-air
broadcast subscription television service. Concerning rates
for subscription television service the Commission stated:

"The public is free to subscribe or not to
subscribe to STV services. We believe that
the marketplaces will regulate the charges
that are paid and that if they are excessive,
the operations will not succeed . . . (foot-
note omitted)."

Fourth Report and Order in Docket 11279, 15 FCC 2d 466,
548 (1968). The Commission's adoption of this policy was
confirmed on appeal, the United States Court of Appeals
for the District of Columbia Circuit specifically finding
that the Commission's "predictions as to the probable
course of rates and existence of meaningful competition
are certainly not unreasonable." National Association
of Theater Owners v. FCC, 420 F.2d 194, 203 (D.C. Cir.
1969). cert. denied, 397 U.S. 922 (1970).

3. Regular cablecasting is program origination with-
out the additional per-program or per-channel charge. Sub-
scription cablecasting, or "pay cable," involves the cable
television system distribution of non-broadcast programming
for which the cable television system subscriber is charged
an additional program or channel fee beyond the regular
monthly fee for the system's basic service--television
signal reception service and other origination services.
Subscription cablecasting may be under-

taken by either the system operator or by an independent entrepreneur pursuant to a contract with the system operator for distribution of such programming. Access to subscription cablecast programming is limited to those subscribers who have paid the incremental fee for the service. This fee can be charged on either a per-channel or a per-program basis. The majority of pay-cable operations now in existence charge a flat monthly fee for an additional channel of programming. Those subscribing are typically supplied with a device which converts the programming from a channel that cannot be viewed on a conventional television receiver to one that can. Most systems engaging in per-channel pay operations offer a channel of programming on which a mixture of feature film, sports, and other programming is combined. However, some systems are in operation or in the process of development which offer the subscriber various viewing options under different price structures. For example, the subscriber could be given the option of receiving only the sports programming, or of receiving only instructional programming. Systems are also in operation or under development that assess fees only for those individual programs selected for viewing by the subscriber. Under such systems programs may be individually priced in accordance with their cost, consumer demand, and any other factors the system or pay program originator may deem appropriate.

4. Technically the systems for levying per-program charges are varied and the development of new techniques is continuing. Systems are in operation or have been tested that require the subscriber to purchase a ticket in advance which when inserted into a special unscrambler

or decoding device in the subscriber's homes, provides access to the programming which is scrambled or otherwise coded at the cable system's headend or central distribution point. Other systems require a telephone call from the subscriber to a central facility from which the programming is electronically released to the subscriber. Still other systems utilize the two-way communications capacity of cable television systems to ascertain when pay programming is tuned in, and prepare an appropriate bill for such reception. Although technical, economic, and marketing problems have delayed the wide introduction of per-program charge systems of pay cable operation, they have been considered by some to be superior to the per-channel systems because they allow subscribers to pay only for that programming actually viewed. They introduce the possibility of a more flexible price mechanism, and allow the owner of each program to be paid according to how many subscribers view the program rather than being paid simply a fraction of a subscriber's monthly fee for all programming offered for viewing. See Exhibits A and B attached hereto which describe the process by which subscribers receive pay program.

5. Cable television has the unique capability to provide many channels for the transmission of electronic signals without use of the limited broadcast spectrum. The cable system, unlike the conventional television broadcast transmission facility, is not limited to one-channel transmission but rather has the technical flexibility to furnish originated or other specialized programs and services on some channels without affecting the programming and services simultaneously transmitted on others. Thus, a single system with a 20-channel capacity, may carry simultaneously as many as 20 separate programs, for example, in a typical major market, the local cable system would carry all of the local broadcast

signals, such as the local network affiliates. The system would also carry programming on public, educational, and governmental access channels, as well as programming over those remaining channels which are leased by the cable system.

6. Cable television systems frequently transmit their own programming and retransmit broadcast television signals across state lines. Pay cable programming, including particularly sports and feature film programming, is not typically originally produced in the community in which the pay cable system operates, but is filmed or taped in, or televised from, locations in all parts of the country and abroad. Live sports programming is typically relayed to the cable community over interstate communications routes licensed and regulated by the Commission. Pay cable programming, including not only sports but feature film and other programming as well, is most frequently relayed to the cable television community from a central distribution point over private or common carrier microwave radio stations, over the facilities of interstate common carriers via domestic communications satellites and associated earth stations, or by some combination of these facilities. Each of these interstate transmission facilities is regulated by the Commission. These facilities provide an interstate network whereby pay cable programming can be transmitted simultaneously to numerous cable systems in New York and elsewhere. Such an interstate pay cable network could ultimately bring even the smallest communities a variety of programming now available only in the largest metropolitan areas, and at far lower cost. Also, the Commission has found furtherance of

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programming diversity by development of a network of leased channels interconnected by interstate transmission facilities to be clearly in the public interest. Exhibit C attached hereto illustrates the interstate transmission facilities currently used to transmit pay cable programming. 104

HISTORY OF REGULATION

7. Cable television began in 1948 as an auxiliary service that carried broadcast television signals to communities where off-the-air reception was not possible. These early cable systems were located in outlying areas and typically had three-channel capacity. By the mid-1960's, however, cable technology had advanced to the point that twelve-channel and higher capacity systems were developing. With the expansion of channel capacity cable systems began to offer a variety of non-broadcast programming produced or procured by the system operator in addition to the television broadcast signals traditionally provided. This metamorphosis in the nature of cable television service led the Commission to issue the Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15791, 1 FCC 2d 453 (1965), which commenced the Commission's investigation as to whether the public interest would best be served by the Commission's restricting cable television systems to carriage of television broadcast signals, by allowing them to originate programming without restriction, or by adopting an intermediate position.

8. In the three years following adoption of the Notice in Docket No. 15971 cable technology continued to advance. The capacity to provide twenty or more channels became a reality, with the concomitant result that increasing emphasis was placed on local public service and entertainment cable-originated programming. The cable industry underwent a

concomitant period of exceptional growth. The number of cable systems increased from approximately 1300 to 1847. An additional 758 communities had franchised cable television systems and 938 franchise applications were still pending. Cable growth was accelerating particularly in metropolitan areas, with cable television systems operating pending or applied for accounted for at least 85 million people. Accordingly, the Commission issued the Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, 15 FCC 2d 417 (1968), terminating the proceeding in Docket No. 15971 and seeking to determine how best to obtain, consistent with the public interest standard of the Communications Act of 1934, the full benefits of developing cable television technology and potential services for the public. The Commission determined that cable television's unique multi-channel capacity made it singularly suited to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. It also concluded that a multi-purpose cable operation combining carriage of broadcast signals with program origination and access programming would best utilize cable channel capacity to the benefit of the public. Accordingly, the Commission adopted rules requiring that cable systems of a stated size originate their own programming. First Report and Order in Docket No. 18397, 20 FCC 2d 201 at 223 (1969). In so doing, the Commission specified that its aim of obtaining programming diversity could be met by the system operators' presentation of films and tapes produced by other sources.

9. Noting the promise of significant added program diversity that pay cable presented, and citing the fact that it was a virtually untried service, the Commission declined to impose any restrictions other than the anti-siphoning rules previously applied to subscription operations. The Commission further stated that it encouraged, and might ultimately require, the leasing of channels for the presentation of such programming on either a local or interconnected basis, to promote diversity of control over the media of communications, expand the variety of programming available and increase the opportunities for television communication with the public by more widespread sources. For these reasons local franchise provisions purporting to prohibit cable-originated programming were declared invalid, First Report and Order, supra at 223, In re Clarification of CATV First Report as to Scope of Federal Preemption, 20 FCC 2d 741 (1969), as were local ordinances prohibiting pay cable, In re Request by Time-Life Broadcast, Inc., 31 FCC 2d 747 (1971). In adopting its comprehensive new regulatory program for cable television in 1972, the Commission in the Cable Television Report and Order, 36 FCC 2d 143, 193 (1972) provided for the establishment of leased-access channels which a cable system operator could lease to others or use itself for the presentation of specialized programming services, including pay cable, and preempted local authorities from regulating what was to be presented on those channels or the rates charged to subscribers or advertisers therefor.

ECONOMIC CONCERNS

10. In the course of developing its regulatory program with respect to subscription television, the Commission had experience with strong opposition to "pay TV" voiced by segments of the communications industry.

In the late 1960's the theatre owners and others opposed to subscription television mounted an immense campaign against pay TV, which resulted in a number of bills in the state legislatures and city councils to prohibit pay TV. This manifest hostility to the concept of pay TV had, in fact, already destroyed one early pay cable experiment. In 1963-1964 a subsidiary of Subscription Television, Inc., had wired sections of Los Angeles for a pay-cable network. A "Free Television Act," which was enacted in California, prohibited pay cable and, as a consequence the Company's articles of incorporation were refused for filing. The Supreme Court of California in Weaver v. Jordan, 411 P.2d 289, cert. denied, 385 U.S. 844 (1966), ruled the proscription against pay TV unconstitutional; however, the system went bankrupt and lost ten million dollars. Accordingly the Commission was concerned that opposition to the concept of pay TV not be carried over to pay cable and result in stifling this potentially important source of programming diversity before it had a chance to develop.

11. What might occur in the absence of the Commission's pre-emptions has been further illustrated by various regulations adopted or proposed by various states or municipalities. In February 1969, twenty-seven New York State Assemblymen introduced a bill to prohibit cable systems from offering movies or other entertainment for pay. In New York City movie theatre interests urged the city council to restrict pay cable operations and such restrictions were adopted. In Connecticut the state legislature adopted a bill (P.A. 74-147, House Bill No. 5496), subsequently vetoed by the Governor, which would have prohibited use of existing public utility facilities if the cable operator charged any per-program fee. The proponents of

the bill were apparently prepared to admit that the intent of the Act was "to construct an economic barrier that will prevent the development of paid cable television in Connecticut." May 9, 1974 veto message from Governor Thomas J. Meskill to Gloria Schaffer, Connecticut Secretary of State. Numerous municipal cable franchises have attempted to prohibit pay cable operations. See, for example, the Commission's decision in CATV of Rockford, Inc., 38 FCC 2d 10 (1973). This exercise or potential exercise of regulatory authority by state and local governments is inconsistent with the Commission's intent of allowing new and innovative pay cable experiments to develop in a market place free of actual or potential restraints.

12. A certain risk is arguably encountered in investing in the pay cable industry as pay cable service is not economically established and the system operator sustains substantial cost in programming the channel. The economic viability and ultimate acceptability of pay cable can be determined only if this new and innovative service is permitted free experimentation in the market place. The Commission has determined that regulation of subscriber charges for pay cable by any entity, federal or nonfederal, would artificially inhibit the free functioning of the marketplace, and therefore, frustrate the experimentation needed to establish the ultimate nature and viability of pay cable service. As was found regarding subscription television, a natural, marketplace ceiling on rates would be provided by the substantial amount of economic competition that would exist between pay cable and other forms of entertainment and enlightenment. It should be noted, however, that the Commission's leased channel rules are specifically intended to allow a number of pay channels on one cable system which may compete with one another, so that the potential for direct rate competition in the provision of pay services does exist. Competition from

over-the-air "free" and subscription television service and from subscription programming distributed on a closed circuit basis to apartment buildings and hotels over the facilities of common carrier multi-point distribution stations licensed by the Commission also offer competitive means of distributing subscription or pay television programming. Similarly, the Commission has determined that regulation of pay cable subscriber rates by a multiplicity of local and state authorities could create a significant barrier to the transmission of interconnected programming via satellite or interstate terrestrial facilities which the Commission envisioned in the 1968 and 1972 rulemaking proceedings, Report and Order, 20 FCC 2d 201, 205 (1969) and 36 FCC 2d 143, 193 (1972) respectively. The development of a viable system of networking pay cable programming depends upon the program supplier being assured of an interconnecting network of subscribing cable systems whose rates are controlled by the marketplace rather than being subject to artificial and sudden changes that could potentially be decreed by numerous local and state regulators. These considerations led the Commission to determine that its preemption of subscriber rate regulation for pay cable, as for subscription television, was both proper and required.

NEED FOR FEDERAL PREEMPTION

13. Also, the Commission has determined that dual regulation of access channels would be "confusing and impracticable," stating that, "our objective of allowing a period for experimentation might be jeopardized if, for example, a local entity were to specify more restrictive regulations than we have prescribed. Report and Order, 36 FCC 2d at 193. Thus, except for the government channel, local regulation of access channels is prohibited." Section 76.251(a)(11)(iii) of the Rules therefore provides that,

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"For the leased channel(s), [the] system shall establish rules . . . specifying an appropriate rate schedule . . ."

and Section 76.251(a)(ii)(iv) specifies that, "Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels . . .". The Commission's policy of pre-empting jurisdiction of rates for pay cable, with the intent of letting the marketplace function freely, was further stated in the Clarification of Rules and Notice of Proposed Rulemaking, 46 FCC 2d 175 (1974), In the Matter of Amendment of Part 76, Subpart G, of the Commission's Rules and Regulations Pertaining to the Cablecasting of Programs for which a Per-Program or a Per-Channel Charge is Made (Docket No. 19554), 52 FCC 2d 1 (1975), In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television, (Docket No. 20272), 49 FCC 2d 1199 (1975), and In the Matter of Inquiry into the Manner in which Cable Television Regular Subscriber Rates are Established (Docket No. 20767), 58 FCC 2d ____ (1976).

Specifically with respect to regulation of rates for pay cable service the Commission stated

"We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful, including most particularly fee television, motion picture theaters, live sports, and other entertainment events." 52 FCC 2d 1, paragraph 217 (1975).

As noted earlier, the Commission, in its pay cable policy, is following its policy in subscription television service set forth in 1968. Fourth Report and Order, 15 FCC 2d 466 (1968).

AFFIDAVIT IN SUPPORT OF CROSS-MOTION AND OPPOSITION

14. Available statistics tend to show that pay cable has grown since the inception of the Commission's 1972 Rules. By August 1973 there were 35,000 pay cable subscribers; by April 1975 there were 160,000 and there are now approximately 500,000. Also, whereas in 1971 there were only nine suppliers of pay cable equipment and programming, by 1976 there were more than thirty. In October 1975 the pay cable company, Home Box Office, inaugurated the first network distribution of pay cable programming by satellite to earth stations located in Florida, Texas, Arizona, and California.

5. Despite the advances that have been made, however, cable remains an industry with an uncertain economic future. Its half million subscribers represent less than one percent of the total number of television households nationwide. Its continuing growth and public acceptance is reflected in the number of applications for earth stations that are currently pending, a list of which is attached hereto as Exhibit D. Nor has its potential to provide programming diversity yet been fully realized; the number and variety of programs presented is still evolving. In July 1975 it was announced that American Film Theatre had leased 13 of its productions for pay cable showings; this constituted the first significant acquisition of exclusive programming for pay cable. In October 1975 it was announced that "The Pallisers," a twenty-six episode series based on six Victorian novels of Anthony Trollope and produced by the British Broadcasting Corporation, had been secured for presentation on pay cable. Home Box Office is developing and presenting a series of hour-long video-taped live comedy performances, entitled "On Location," and Lincoln Center for the Performing Arts is currently engaged

in an eighteen-month program in which it is exploring the possibilities of extending its offerings by means of pay cable. Because pay cable service is still developing and has not yet achieved fully its potential of providing as great a segment of the public as possible with the program diversity which it is ultimately capable of supplying, the Commission has determined that continuation of its current regulatory program is in the public interest.

16. The need for uniform jurisdiction and regulation is further demonstrated by the fact that some state and local authorities have elected to regulate pay cable subscriber rates. In April 1976 it was necessary to clarify the Commission's preemption in light of the New Jersey Office of Cable Television's apparent intent to regulate subscriber rates for auxiliary cable services. It has also been necessary to inform local franchising authorities on several occasions that provisions in their franchises purporting to regulate pay cable subscriber rates are inconsistent with the Commission's Rules. The Commission is also concerned that absent its pre-emption, those localities hostile to pay cable service might attempt to preclude operations by the simple expedient of setting an unrealistically high or low subscriber rate.

Also, delayed governmental action on rate applications could have an adverse impact on the implementation of pay cable service. The existence of a residual antipathy to pay services by vested interests is shown by the fact that since 1972 several local jurisdictions have included provisions in cable television franchises purporting to forbid the system operator from offering pay cable service despite the Commission's preemption. Although such regulation is clearly contrary to Commission rules and policy, the time and effort needed to obtain judicial remedy could effectively doom pay cable service in a given community.

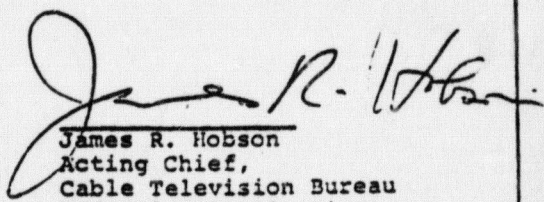
AFFIDAVIT IN SUPPORT OF CROSS-MOTION AND OPPOSITION

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as evidenced by the fate of the cable company in Weaver v. Jordan, supra. Moreover, the possibility of having also to resort to Court action in a multiplicity of jurisdictions to remove local proscriptions against pay cable would almost certainly preclude any possibility of establishing or maintaining a viable interstate pay cable network.

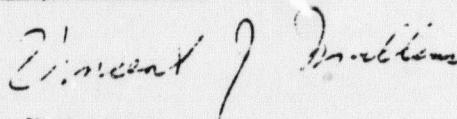
17. Further, the Commission has stated that, at such time as clear trends develop and it finds that the free market place does not adequately protect the public interest, it would reconsider its present policies. Clarification, 46 FCC 2d at 200. To date there has been no indication that the marketplace is not an adequate regulator of pay cable rates and the Commission presently intends no change in its preemption policy with respect to this still small and developing interstate Communications service.

18. In sum, the Commission has determined that pay cable is a new and promising source of programming diversity, and the Commission has made the judgment that the public interest is best served by refusing to allow pay cable development to be inhibited by rate regulation. To this end, the Commission has preempted jurisdiction over pay cable, precluding local and state authorities from proscribing pay cable service or prescribing the types of programming to be offered for pay and the rates to be charged to subscribers therefor.


James R. Hobson
Acting Chief,
Cable Television Bureau
Federal Communications
Commission

Sworn to before me this

4th day of June, 1976



My Commission Expires
November 14, 1976

EXHIBIT A - ANNEXED TO HOBSON AFFIDAVIT

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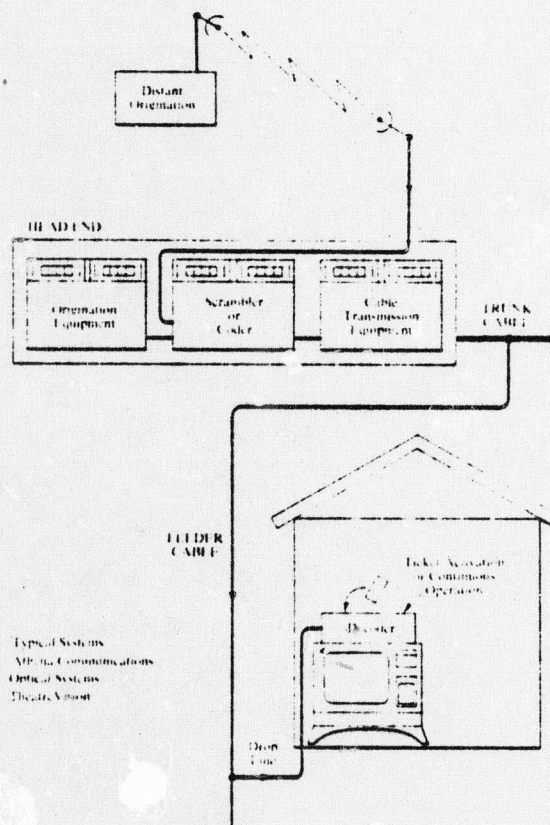


EXHIBIT A

One-Way Pay Cable System with Per-Program Billing

EXHIBIT B - ANNEXED TO HOBSON AFFIDAVIT

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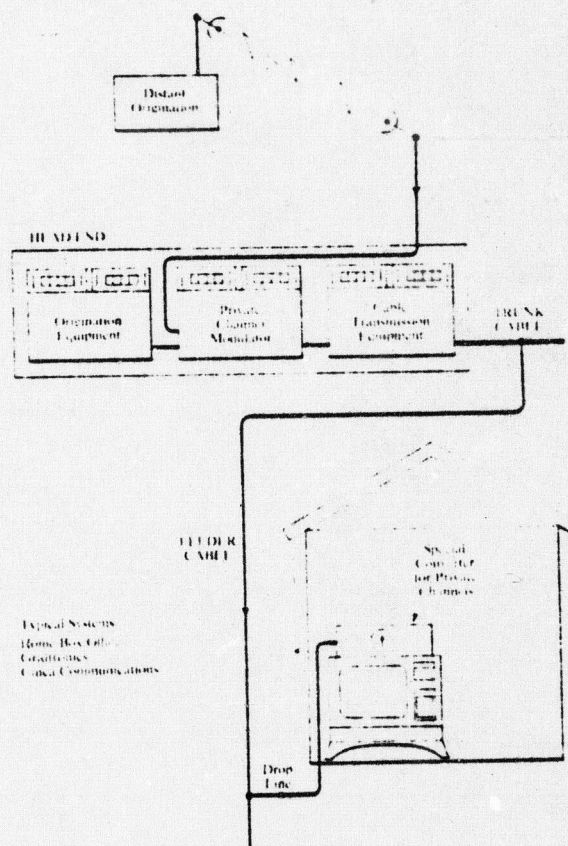
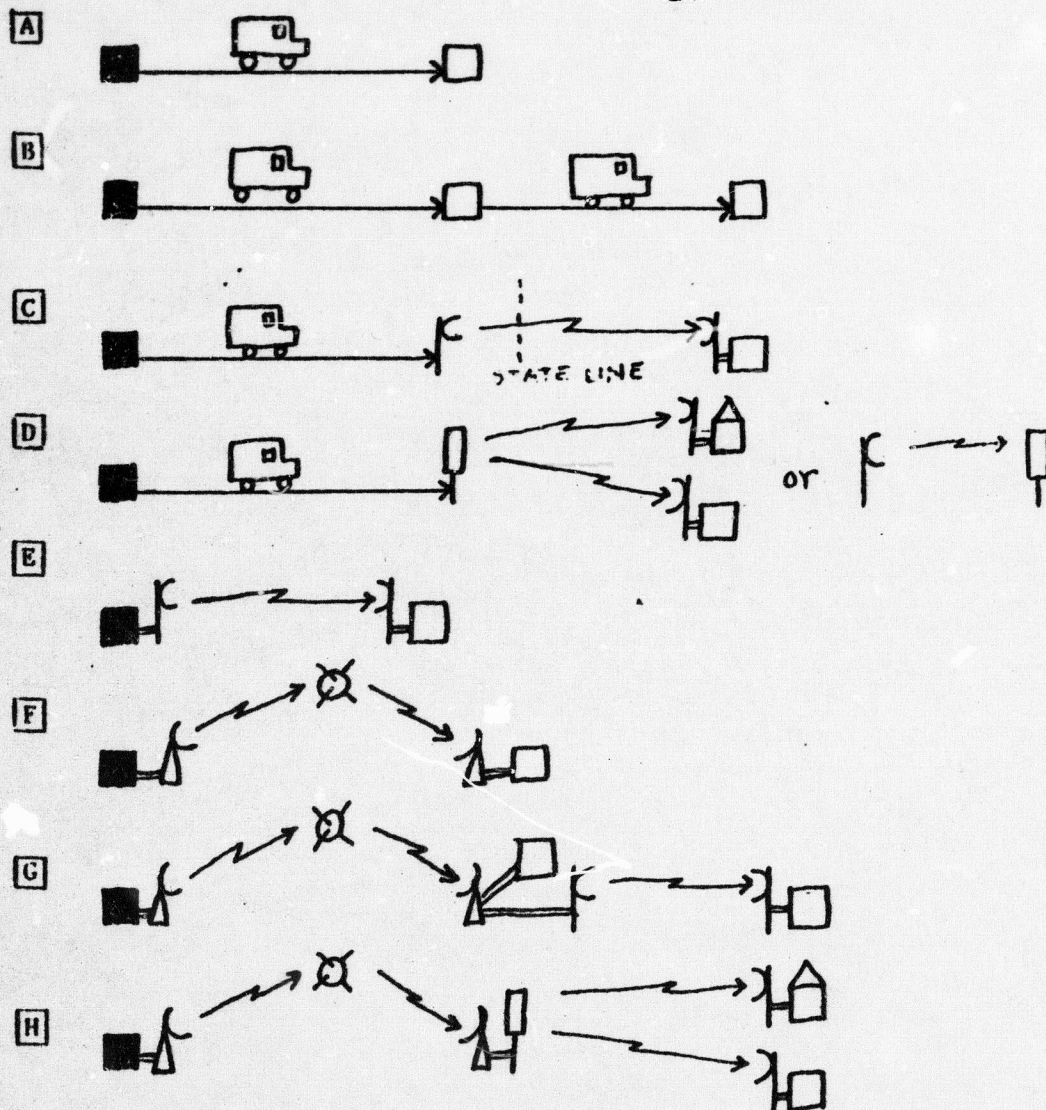


EXHIBIT B

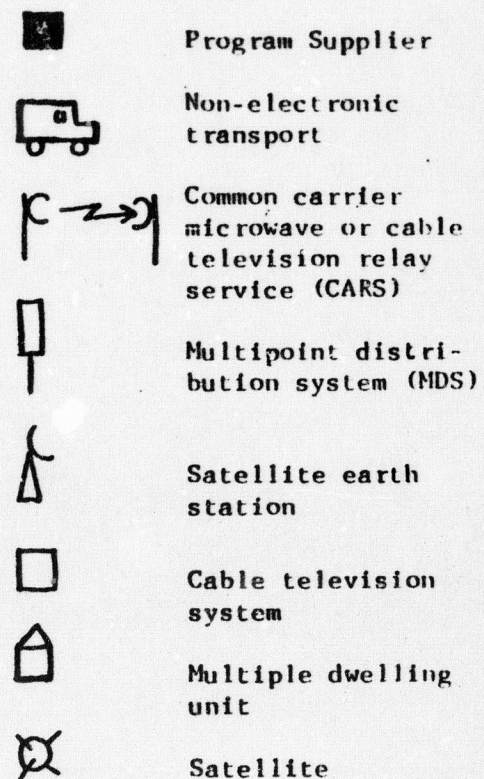
One-Way Pay Cable System with Per-Channel Billing

TYPICAL DISTRIBUTION SCHEMES FOR SUBSCRIPTION PROGRAMING
(code to following maps)

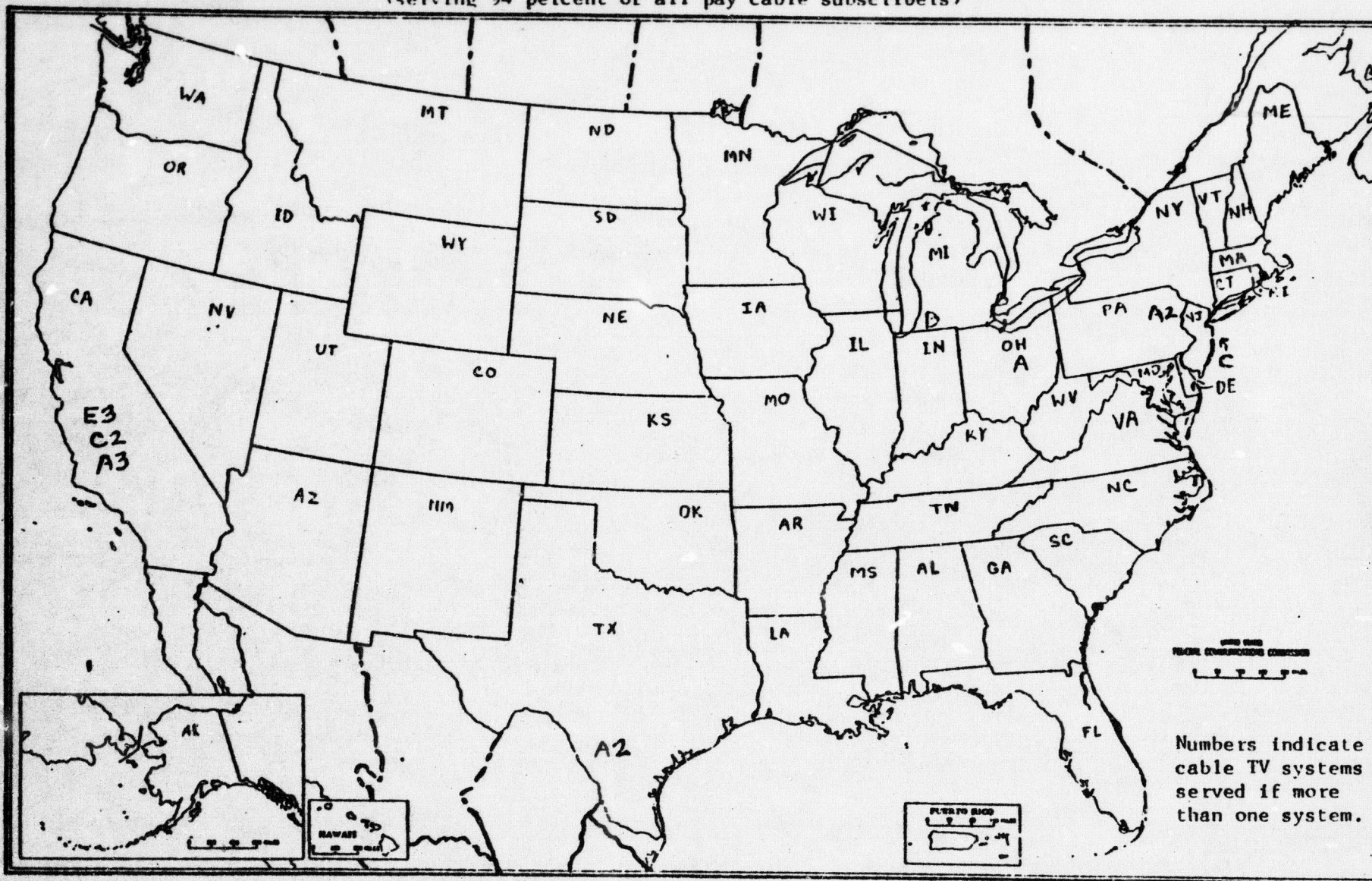
Scheme



Symbols



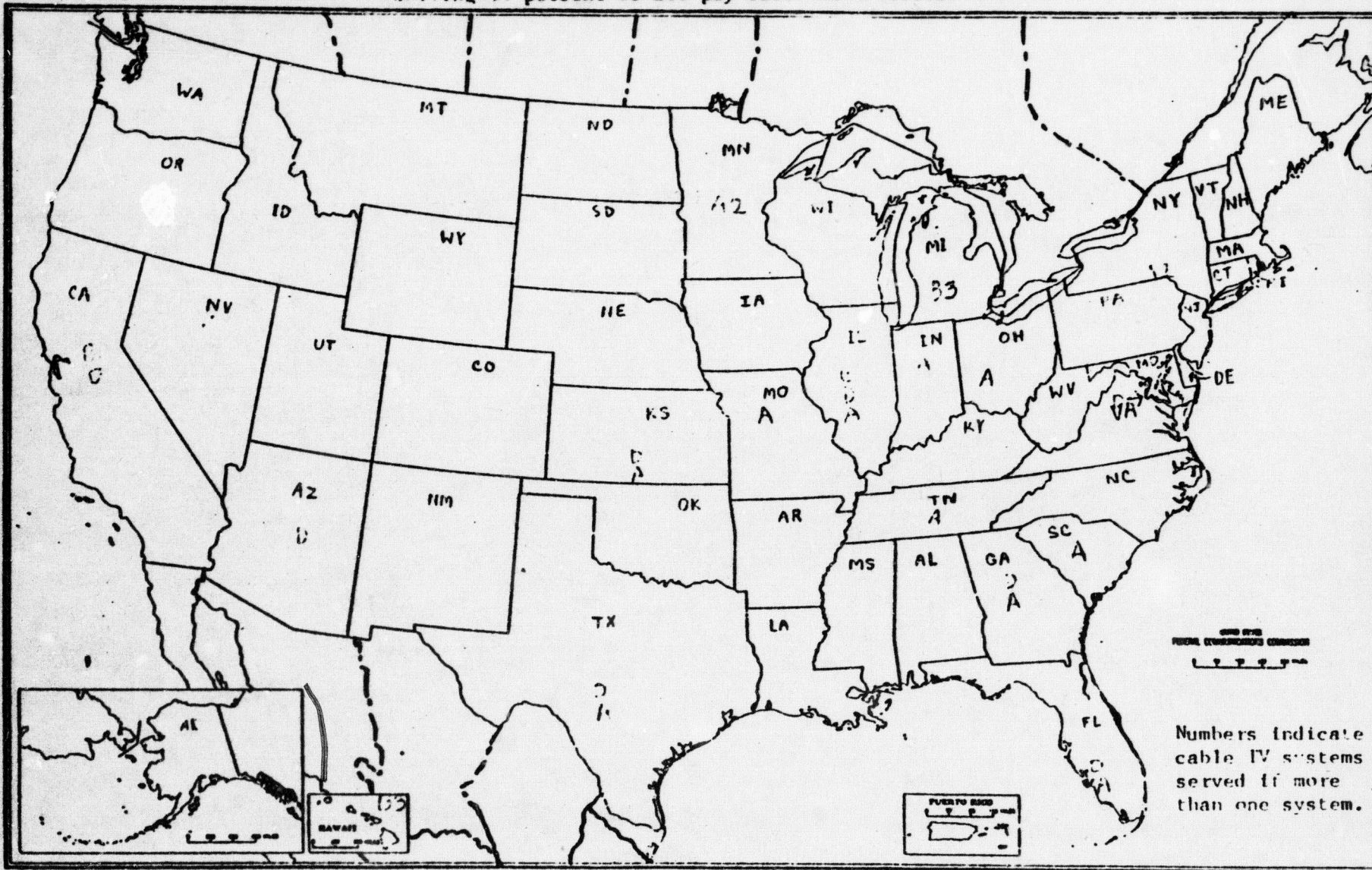
SUBSCRIPTION PROGRAMING DISTRIBUTION BY ITS THREE LARGEST SUPPLIERS
(serving 94 percent of all pay cable subscribers)



OPTICAL SYSTEMS CORP.
(serves 9 % of all pay cable subscribers)

SUBSCRIPTION PROGRAMING DISTRIBUTION BY ITS THREE LARGEST SUPPLIERS

(serving 94 percent of all pay cable subscribers)



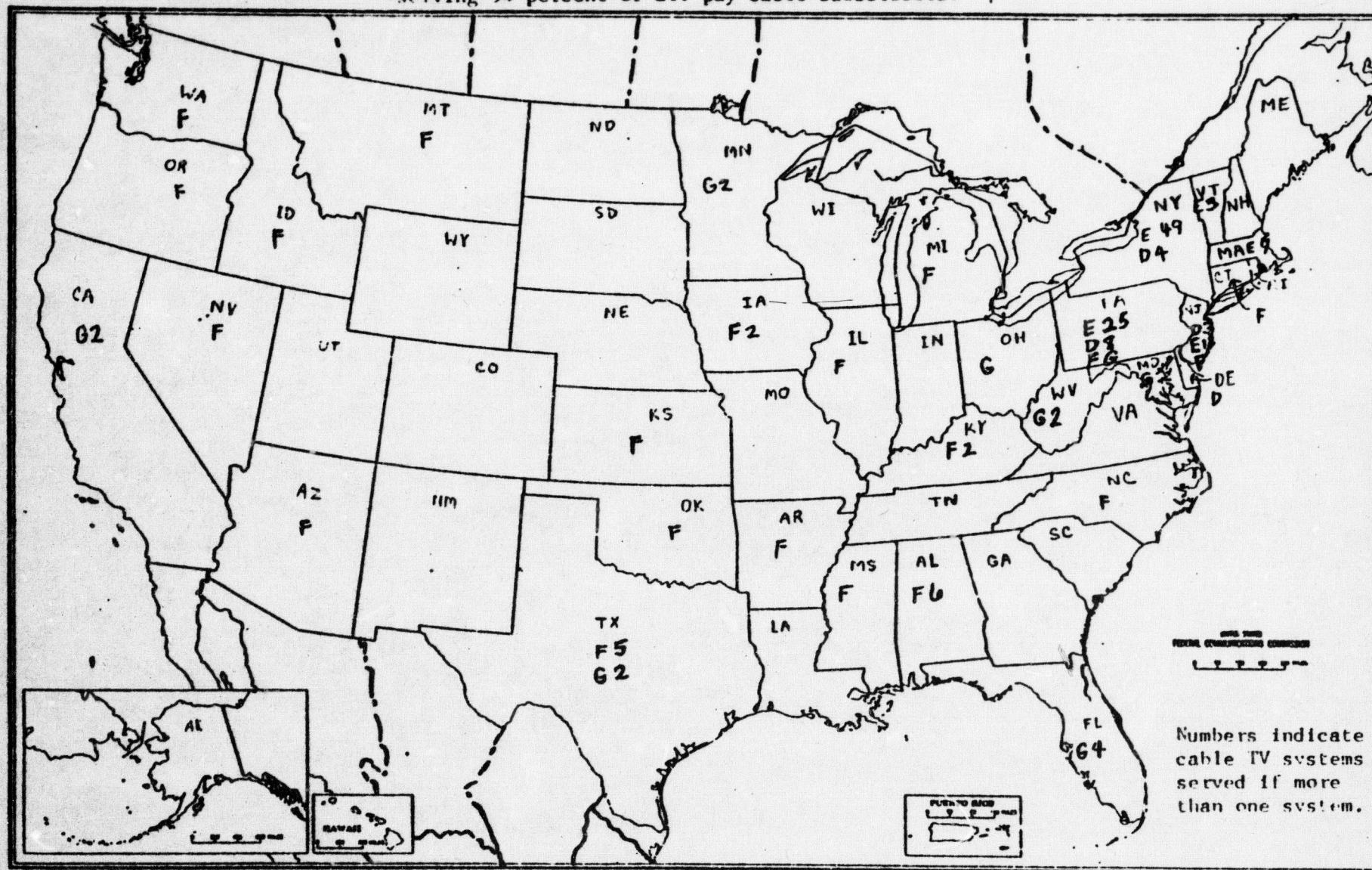
TELEPHONE PROGRAM SERVICES INC.

(serves 26 % of all pay cable subscribers)

SUBSCRIPTION PROGRAMING DISTRIBUTION BY ITS THREE LARGEST SUPPLIERS
(serving 94 percent of all pay cable subscribers)

EXHIBIT C - ANNEXED TO HOBSON AFFIDAVIT

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HOME BOX OFFICE INC.
(serves 59 % of all pay cable subscribers)

Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Added Attractions W.Lafayette, Ind.	Greeley Bernard (Greeley)	9/21/75	50-DSE-P-76 WB55	9/22/75	No	P 1/2/76
Added Attractions Grand Island, Neb.	Greeley Bernard (Greeley)	11/28/75	118-DSE-P-76 KB71 330-DSE-L-76	12/15/75	No	P 2/18/76
*American Video Corp. Pompano Bch, Fla.	Cole, Zylstra & Raywid (James)	1/9/76	150-DSE-P/L 76 WB65	1/26/76	No	P/L 3/2/76
ATC-d/b/a Capital Cablevision Jackson, Miss.	Wilner & Scheiner (J. Wilner)	7/15/75	8-DSE-P-76 WB46 56-DSE-L-76	7/28/75	No	P 9/10/75 L 2/13/76
**ATC-Unic. areas of Orange Co. near Winter Park, Fla. (Orlando)	Wilner & Scheiner (J. Wilner)	7/29/75	14-DSE-P-76 WB71	8/11/75	No	P 4/6/76
Cablevision Invest. Waco, Tex.	Cole, Zylstra & Raywid (James)	1/30/76	171-DSE-P-76 KB77	2/17/76	No	P 4/8/76

* 4/5/76 granted modification of permit and license to change frequency range and antenna parameters; File No. 271-DSE-MP-ML-76.

** ATC is a common carrier; 214 Auth. applied for 1/6/76; File No. W-P-C-708; pending. TA granted 5/19/76.

Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Cable Haven, TV, Manahawkin, N.J.	Pittman, Lovett, Ford & Hennessey	12/12/75	132-DSE-P-76 WB64 289-DSE-L-76	12/22/75	No	P 3/12/7 L 5/5/76
Communications Services Manhattan, N.Y.	Fisher, Wayland, Southmayd & Cooper	12/12/75	131-DSE-P-76 KB73 325-DSE-L-76	12/22/75	No	P 2/26/7 L 5/18/7
Community Cablevision Bryan, Tex.	Cole, Zylstra & Raywid (James)	10/1/75	66-DSE-P/L-76 KB59	10/14/75	No	P/L 12/31/75
Consolidated Cable Utilities Aurora, Ill.	Stambler & Shrinsky (Koerner)	1/8/76	149-DSE-P-76 WB68 326-DSE-L-76	1/19/76	No	P 3/16/7 L 5/18/7
Courier Cable Buffalo, N.Y.	Kirkland Ellis & Rowe	3/5/76	250-DSE-P/L-76 WB77	3/22/76	No	P/L 5/4/76
Cox Cable Communications Lubbock, Tex.	Dow, Lohnes & Albertson (Helein)	9/11/75	49-DSE-P-76 KB64	9/22/75	No	P 2/13/7
Cox Cable Saginaw, Mich.	Dow, Lohnes & Albertson (Helein)	9/25/75	55-DSE-P-76 WB51 168-DSE-L-76	9/30/75	No	P 11/13/7 L 2/13/7

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

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Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
*Eastern Microwave Hookstown, Pa.	Dow, Lohnes & Albertson (Helein)	10/3/75	70-DSE-P-76 WB70 328 DSE-L-76	10/14/75	No	P 3/17/76 L 5/18/76
Eastern Shore CATV Berlin, Md.	Cole, Zylstra & Raywid (James)	12/19/75	135-DSE-P/L-76 WB66	1/5/76	No	P/L 3/9/76
Erie Co. Community Antenna Television Erie, Pa.	Cohen & Berfield	8/8/75	23-DSE-P-76 WB58 169-DSE-L-76	8/25/75	No	P 12/16/75 L 2/13/76
First Television Corp. Maple Lake, Minn.	Greeley & Bernard (Greeley)	2/19/76	182-DSE-P-76 KB83	3/1/76	No	P 4/15/76
Frontier Broad- casting Co. Cheyenne, Wyo.	Koteen & Burt (Wheeler)	10/20/75	98-DSE-P-76 KB61 111-DSE-L-76	10/28/75	No	P 1/16/76 L 1/16/76
Gill Cable San Jose, Calif.	Fletcher, Heald, Rowell Kenehan & Hildreth	7/7/75	1-DSE-P-76 KB48	7/21/75	No	P 9/16/75
Greater Hartford CATV Manchester, Conn.	Dow, Lohnes & Albertson (Helein)	1/21/76	165-DSE-P/L-76 WB75	2/2/76	No	P/L 4/12/76

* Eastern Microwave is a common carrier and has filed a § 214 application on 3/3/76, TA granted 5/25/76. File No. W-P-C 795.

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

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Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
*Hayward CATV Hayward, Calif.	Cole, Zylstra & Raywid (James)	11/12/75	113-DSE-P/L-76 KB66	11/24/75	No	P/L 2/13/76
**Heritage Communications Des Moines, Iowa	Arthur Hutzler, V.P. Eng.	9/5/75	51-DSE-P-76 KB54 138-DSE-L-76	9/22/75	No	P 12/5/75 L 2/13/76
Liberty Communications Birmingham, Ala.	Fly, Shuebruk Blume & Gaguine	11/12/75	107-DSE-P-76 WB60 177-DSE-L-76	11/17/75	No	P 1/13/76 L 2/24/76
Micro-Comm. Corp. d/b/a/ Valley Telecasting Co. Yuma, Arizona	Cole, Zylstra & Raywid (James)	10/24/75	100-DSE-P/L-76 KB62	11/3/75	No	P/L 1/27/76
Micro-Cable Comm. Corp. d/b/a Florida Cablevision, Ft. Pierce, Fla.	Cole, Zylstra & Raywid (James)	4/28/75	30-DSE-P-75 WB42 71-DSE-L-76	5/5/75	No	P 8/1/75 L 2/13/76
Micro-Cable Comm. Corp. d/b/a/ Texas Cablevision Ballinger, Texas	Cole, Zylstra & Raywid (James)	11/7/75	108-DSE-P/L-76 KB65	11/17/75	No	P/L 2/24/76

* Filed Assignment of license No.331-DSE-AL-76, to Satellite Transmission and Receiving Corporation (partnership of United Cable Television Corp. & Teleprompter Corp. TA sought for service to Teleprompter, as well as United Cable Systems.

** Filed modification of license to receive signal of TV broadcast Channel 17, Atlanta, Georgia. File No. 343-DSE-ML-76, filed 5/17/76.

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

23

Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Micro-Cable Comm. d/b/a/ Columbia Television Pasco-Kennewick, Wash.	Cole, Zylstra & Raywid (James)	2/9/76	174-DSE-P/L-76 KB78	2/23/76	No	P/L 4/13/76
Midwest Video Corp. Div. of Home Theatres Bryan, Texas	Arent, Fox, Kintner, Plotkin & Kahn	10/10/75	83-DSE-P/L-76 KB60	10/20/75	No	P/L 12/12/75
Nilcom Inc. Belvidere, Ill.	Cole, Zylstra & Raywid (James)	12/17/75	134-DSE-P-76 WB67	1/5/76	No	P 3/9/76
Owensboro Cablevision Owensboro, Ky.	Wilner & Scheiner (J.Wilner)	8/8/75	22-DSE-P-76 WB50 116-DSE-L-76	8/25/75	No	P 10/14/75 L 2/13/76
River City CATV Louisville, Ky.	Hogan & Hartson (Reyner)	2/3/76	172-DSE-P-76 WB78	2/17/76	No	P/L 5/10/76
Rollins Cablevue North Branford, Conn.	Smith & Pepper	3/10/76	248-DSE-P/L-76 WB76	3/22/76	No	P/L 5/3/76

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

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Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
South Florida Cable TV Corp. Bonita Springs, Fla.	Koteen & Burt (Wheeler)	6/20/75	81-DSE-P-75 WB45 285-DSE-L-76	6/30/75	No	P 9/25/75 L 4/15/76
Storer Cable TV of Florida Sarasota, Fla.	Warren Zwicky	2/12/76	175-DSE-P/L-76 WB72	2/23/76	No	P/L 4/12/76
Summit Communica- tions d/b/a Summit Cable Services of Winston-Salem, N.C.	Fly, Shuebruk, Blume & Gaguine	11/12/75	112-DSE-P-76 WB59 243-DSE-L-76	11/24/75	No	P 2/13/76 L 3/12/76
Telecable Overland Park, Kan.	Hogan & Hartson (Reyner)	1/6/76	147-DSE-P-76	1/19/76	No	P 4/23/76
Teleprompter Florence, Ala.	Hogan & Hartson (Reyner)	12/4/75	126-DSE-P-76 WB63 269-DSE-L-76	12/15/75	No	P 2/26/76 L 4/1/76
Teleprompter Gadsden, Ala.	Hogan & Hartson (Reyner)	9/23/75	58-DSE-P-76 WB52 154-DSE-L-76	10/6/75	No	P 12/4/75 L 2/13/76

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

125

Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Teleprompter Huntsville, Ala.	Hogan & Hartson (Reyner)	2/13/76	181-DSE-P/L-76 WB73	3/1/76	No	P/L 4/12/76
Teleprompter Mobile, Ala.	Hogan & Hartson (Reyner)	8/22/75	36-DSE-P-76 WB48 121-DSE-L-76	9/2/75	No	P 10/22/75 L 2/13/76
Teleprompter Tuscaloosa, Ala.	Hogan & Hartson (Reyner)	8/22/75	37-DSE-P-76 WB49 130-DSE-L-76	9/2/75	No	P 10/22/75 L 2/13/76
*Teleprompter Santa Maria, Ca.	Hogan & Hartson (Reyner)	2/24/76	199-DSE-P/L-76 KB84	3/8/76	No	P/L 4/28/76
Teleprompter Santa Cruz, Ca.	Hogan & Hartson (Reyner)	10/24/75	102-DSE-P-76 KB63	11/3/75	No	P 2/13/76
Teleprompter W.Palm Beach, Fla.	Hogan & Hartson (Reyner)	9/23/75	57-DSE-P-76 WB57 153-DSE-L-76	10/6/75	No	P 12/31/75 L 2/13/76
Teleprompter Lewiston, Ida.	Hogan & Hartson (Reyner)	2/13/76	179-DSE-P/L-76 KB80	3/1/76	No	P/L 4/12/76
Teleprompter Pocatello, Ida.	Hogan & Hartson (Reyner)	2/13/76	178-DSE-P/L-76 KB79	3/1/76	No	P/L 4/12/76

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT
126

Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Teleprompter Rock Island, Ill.	Hogan & Hartson (Reyner)	10/9/75	72-DSE-P-76 WB54 155-DSE-L-76	10/20/75	No	P 12/22/75 L 2/13/76
*Teleprompter Asbury, Iowa	Hogan & Hartson (Reyner)	10/9/75	73-DSE-P-76 KB55	10/20/75	No	P 12/22/75
Teleprompter South Shore, Ky.	Hogan & Hartson (Reyner)	12/4/75	127-DSE-P-76 WB62 249-DSE-L-76	12/15/75	No	P 2/13/76 L 3/12/76
Teleprompter Rochester, Minn.	Hogan & Hartson (Reyner)	10/9/75	74-DSE-P-76 KB56 156-DSE-L-76	10/20/75	No	P 12/22/75 L 2/13/76
Teleprompter Great Falls, Mont.	Hogan & Hartson (Reyner)	10/9/75	75-DSE-P-76 KB57 157-DSE-L-76	10/20/75	No	P 12/22/75 L 2/13/76
Teleprompter Missula, Mont.	Hogan & Hartson (Reyner)	12/4/75	125-DSE-P-76 KB69 244-DSE-L-76	12/15/75	No	P 2/13/76 L 3/12/76
Teleprompter Reno, Nev.	Hogan & Hartson (Reyner)	2/13/76	180-DSE-P/L-76 KB81	3/1/76	No	P/L 4/12/76

* Teleprompter, Dubuque was granted temporary authority to extend its construction permit to 7/1/76; 3/25/76 Teleprompter filed a modification of construction permit to change station location from Dubuque to Asbury, Iowa (File No. 268-DSE-MP-76; Public Notice dated 4/5/76).(Granted 5/18/76).

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT
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Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CE (P), Lic.(L), Temp. Auth.(TA)
Teleprompter Eugene, Ore.	Hogan & Hartson (Reyner)	3/15/71 Amended 8/22/75	15-DSE-P-71 KB50 122-DSE-L-76	4/13/71	No	P 10/22/75 L 2/13/76
Teleprompter El Paso, Tex.	Hogan & Hartson (Reyner)	12/4/75	124-DSE-P-76 KB72 254-DSE-L-76	12/15/75	No	P 2/26/76 L 3/19/76
Teleprompter Galveston, Tex.	Hogan & Hartson (Reyner)	10/9/75	76-DSE-P-76 KB58 158-DSE-L-76	10/20/75	No	P 10/22/75 L 2/13/76
*Teleprompter Tacoma, Wash.	Hogan & Hartson (Reyner)	8/22/75	38-DSE-P-76 KB51 128-DSE-L-76	9/2/75	No	P 11/24/75 L 2/13/76
Teleprompter Superior, Wis.	Hogan & Hartson (Reyner)	1/9/76	160-DSE-P/L-76 WB69	1/26/76	No	P/L 3/18/76
Teleprompter Fairmont, W.Va.	Hogan & Hartson (Reyner)	8/22/75	35-DSE-P-76 WB47 129-DSE-L-76	9/2/75	No	P 10/22/75 L 2/13/76

* 12/5/75 request for declaratory ruling on joint use of Tacoma facility filed by Dow, Lohnes & Albertson rep. CATV Puget Sound;

12/8/75 request for same filed by Stambler & Schinsky rep. Enumclaw Cable, Inc.

Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Television Cable Services Abilene, Tex.	Cole, Zylstra & Raywid (James)	10/10/75	84-DSE-P/L-76 KB70	10/20/75	No	P/L 2/13/76
*Tower Comm. Newark, Ohio	Gordon & Healy (Healy)	8/28/75	40-DSE-P-76 WB53 303-DSE-L-76	9/8/75	No	P 12/5/75 L 4/30/76
TV Transmission, Inc. Lincoln, Neb.	Cole, Zylstra & Raywid (James)	1/12/76	152-DSE-P-76 KB76	3/18/76	No	P 3/18/76
Tulsa Cable Television Tulsa, Okla.	Cole, Zylstra & Raywid (James)	4/13/71 Amended 5/30/75	30-DSE-(R)-P-71 KB49 99-DSE-L-76	6/15/71	No	P 10/28/75 L 2/13/76
UAC-Vumore Cable of Laredo Laredo, Tex.	Cole, Zylstra & Raywid (James)	6/10/75	62-DSE-(R)-P-75 KB47 104-DSE-L-76	6/23/75	No	P 8/13/75 L 2/13/76
UAC-Columbia Cablevision d/b/a Ft. Smith TV Cable Ft. Smith, Ark.	Cole, Zylstra & Raywid (James)	6/9/75	61-DSE-(R)-P-75 WB44 114-DSE-L-76	6/16/75	No	P 8/13/76 L 2/13/76

* 4/9/76 Application for § 214 authorization granted; 4/15/76 filed FCC Tariff
#1 specifying 5/1/76 for commencement of operations.

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT
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Status of Home Box Office Receive-Only Earth Station Applications

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl. Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
United CATV Corp. of No. Illinois Carpentersville, Ill.	Cole, Zylstra & Raywid (James)	10/21/75	101-DSE-P/L-76 WB56	11/3/75	No	P/L 2/13/76

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

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Status of Home Box Office Receive-Only Earth Station Applications
(Pending)

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
American Cable Television Tempe, Ariz.	Hogan & Hartson (Reyner)	1/6/76	146-DSE-P/L-76	1/19/76	No	
Armstrong Utilites Boardman, Ohio	Cohen & Berfield	4/12/76	291-DSE-P-76	4/19/76	Withdrawn 4/20/76	
Cablevision of Augusta, Inc. Augusta, Ga.	Wilner & Scheiner (J.Wilner)	4/21/76	313-DSE-P/L-76	5/17/76		
Clearwater TV Cable of Enumclaw Auburn, Wash.	Stambler & Shrinsky (Koerner)	3/29/76	270-DSE-P-76	4/5/76	No	
Cox Cable Communications Lamont, Cal.	Dow, Lohnes & Albertson (Helein)	3/25/76	260-DSE-P/L-76	4/5/76	No	
Cox Cable Communications Morristown, Ind.	Dow, Lohnes & Albertson	5/25/76				
Cox Cable Communications Spokane, Wash.	Dow, Lohnes & Albertson (Helein)	4/2/76	274-DSE-P/L-76	4/12/76	No	
*CPI Satellite Telecommunications N.Little Rock, Ark.	Hogan & Hartson (Reyner)	5/6/76	322-DSE-P-76	5/17/76		

* CPI Satellite is a common carrier and applied for § 214 authority
5/6/76. W-P-C 921 - pending

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

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Status of Home Box Office Receive-Only Earth Station Applications
(Pending)

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Hobbs Cable Vision, Inc. Hobbs, N.M.	Mallyck & Bernton	5/6/76	324-DSE-P/L-76	5/17/76		
Micro-Cable Communications d/b/a Imperial Valley Cable TV El Centro, Cal.	Cole, Zylstra & Raywid (James)	11/5/75	103-DSE-P/L-76	11/10/75	Yes *	
News Press & Gazette Company d/b/a St. Joseph Cablevision St. Joseph, Mo.	Stambler & Shrinsky	5/25/76				
**Pilot Butte Transmission Co. Green River, Wyo.	Cole, Zylstra & Raywid (James)	3/31/76	273-DSE-P/L-76	4/12/76	No	
RVS Cablevision Brookfield, Wis.	Fisher, Wayland, Southmayd & Cooper	3/24/76	258-DSE-P-76	4/5/76	No	
Sunflower Cablevision Lawrence, Kan.	Cole, Zylstra & Raywid (James)	5/6/76	323-DSE-P/L-76	5/17/76		

* 12/10/75 KECC TV Corp. petitioned to deny on grounds that "... the approval of Micro-Cable applications to introduce pay TV on its systems in the El Centro/Yuma market would cause a further reduction to the programming offered by KECC." Micro-Cable filed opposition to petition 12/29/75; decision pending.

** Applied for § 214 authorization 4/2/76; File No. W-P-C-852; pending.

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

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Status of Home Box Office Receive-Only Earth Station Applications
(Pending)

Name & Location	Filed By	Date Filed	File No. Call Ltr.	Date of Public Notice	Petitions to Deny (due 30 days after PN)	Appl.Gr. CP.(P), Lic.(L), Temp. Auth.(TA)
Telecinema of Columbus Columbus, Ohio	Hogan & Hartson (Reyner)	12/2/75	120-DSE-P-76 151-DSE-L-76	12/15/75	No	
Teleprompter Johnstown, Pa.	Hogan & Hartson (Reyner)	12/22/75	133-DSE-P/L-76	1/6/76	No	
**United Video Taylorsville, Ill.	Cole, Zylstra & Raywid (James)	1/16/76	161-DSE-P-76	2/2/76	No	
United Video, Inc. Toomey, La.	Cole, Zylstra & Raywid (James)	5/12/76	335-DSE-P-76	5/24/76		
United Wehco Trees, La.	Cole, Zylstra & Raywid (James)	12/23/75	136-DSE-P/L-76	1/5/76	No	
Wentronics d/b/a Community TV Systems of Wyoming Casper, Wyo.	Cole, Zylstra & Raywid (James)	4/2/76	280-DSE-P/L-76	4/12/76	No	

* Amendment filed May 6, 1976; to clarify that the facility is to be operated as a common carrier to entities in Johnstown, Pa., also filed for TA and § 214 authority; file no. W-P-C 920.

** Applied for § 214 authorization 1/16/76; File No. W-P-C-722; pending.

EXHIBIT D - ANNEXED TO HOBSON AFFIDAVIT

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NOTICE OF MOTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
BROOKHAVEN CABLE TV INC.; CAPITOL
CABLEVISION INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS;
INC.; WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIATION
INC.; NEW YORK STATE CABLE TELEVISION
ASSOCIATION; and HOME BOX OFFICE INC.,

Plaintiffs,

-against-

ROBERT F. KELLY, Chairman; JERRY A.
DANEIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD
J. WEGMAN, Commissioners of the
NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants.

Civil Action
No. 70 CV 154

NOTICE OF MOTION
FOR LEAVE TO FILE
A BRIEF AS AMICUS
CURIAE

-----X
S I R S :

PLEASE TAKE NOTICE that the undersigned will
move this Court at a Motion Term thereof, to be held at
the United States District Court for the Northern
District of New York, United States Post Office and
Courthouse, Syracuse, New York on June 14, 1976 at
10:00 AM or as soon thereafter as counsel can be heard,
for an order granting the City of New York permission

NOTICE OF MOTION

135

to file a brief in this proceeding as amicus curiae.

W. BERNARD RICHLAND
Corporation Counsel
The City of New York
1626 Municipal Building
New York, New York 10007
(212) 566-2515

By Evelyn J. Dunce
EVELYN J. DUNCE
Assistant Corporation Counsel

TO:

DUGAN, LYONS, PENTAK, BROWN & TOBIN, ESQS.
Attorneys for Plaintiffs
100 State Street
Albany, New York 12207

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.
Att: Robert S. Smith, Esq.
345 Park Avenue
New York, New York 10022

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

U.S. DEPARTMENT OF JUSTICE
Civil Division
Attorneys for Plaintiffs-Intervenors
Federal Communications Commission
Att: Robert M. Rader, Esq.
Washington, D.C. 20530

NOTICE OF MOTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
BROOKHAVEN CABLE TV INC.; CAPITOL
CABLEVISION INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS,
INC.; WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIATION,
INC.; NEW YORK STATE CABLE TELEVISION
ASSOCIATION; and HOME BOX OFFICE INC.,

Plaintiffs,

-against-

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
FREUDENGAUT; ELI WAGER; and EDWARD
J. WISHMAN, Commissioners of the
NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants.
-----X

Civil Action
No. 76 CV 154

NOTICE FOR LEAVE
TO FILE A BRIEF
AS AMICUS CURIAE

THE CITY OF NEW YORK, hereby moves the Court
for leave to file a brief as amicus curiae. The grounds
for this motion are set forth in the annexed affidavit
of Evelyn J. Junge sworn to June 4, 1976, and the
Proposed Brief of the City of New York As Amicus Curiae
In Opposition To Plaintiffs' Motion For Summary Judgment
And In Support Of Defendants' Cross Motion For Summary

NOTICE OF MOTION

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Judgment is submitted herewith.

Dated: New York, New York
June 4, 1976

Respectfully submitted

W. BERNARD RICHLAND
Corporation Counsel
The City of New York
Municipal Building Rm. 1625
New York, New York 10007
(212) 566-2515

By Evenlyn J. Jung
EVENLYN J. JUNG
Assistant Corporation Counsel

AFFIDAVIT IN SUPPORT OF MOTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
BROOKHAVEN CABLE TV INC.; CAPITOL
CABLEVISION INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS,
INC.; WARNER CABLE OF OCEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIATION,
INC.; NEW YORK STATE CABLE TELEVISION
ASSOCIATION; and HOME BOX OFFICE INC.,

Plaintiffs,

-against-

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGER; and EDWARD
J. WEGMAN, Commissioners of the
NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants.

Civil Action
No. 76 CV 151

AFFIDAVIT

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

EVELYN J. JUNCE being duly sworn, deposes and says:

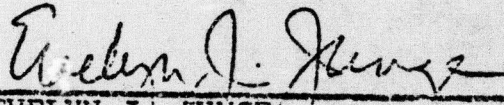
1. I am an Assistant Corporation Counsel in the
Law Department of the City of New York and make this affidavit
in support of the City's motion for leave to file a brief as
amicus curiae.

2. The City of New York has an interest in the instant
proceeding because it franchises cable television systems within
its corporate boundaries.

AFFIDAVIT IN SUPPORT OF MOTION

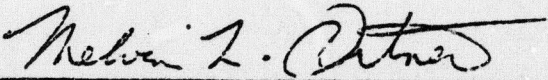
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3. Leave is sought to file a brief as amicus curiae because, upon information and belief, no municipality which franchises cable television systems is represented in this action and hence unless the motion of the City of New York is granted the Court will not otherwise have before it the views of any local authority which franchises cable television systems.


EVELYN J. JUNGE

Sworn to before me

this 4th day of June, 1976.


NOTHARY PUBLIC

MELVIN L. ORTNER
Notary Public, State of New York
No. 24-4517643
Certificate Filed in Kings County
Term Expires March 30, 1978

ORDER

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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF NEW YORK

Coffey
U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

JUN 21 1976

-----x
BROOKHAVEN CABLE TV. INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLEVISION CORP.;
TELEPROMPTER CABLE SYSTEMS, INC.; WARNER
CABLE OF OLEAN, INC.; NATIONAL CABLE
TELEVISION ASSOCIATION, INC.; NEW YORK STATE
CABLE TELEVISION ASSOCIATION, and HOME
BOX OFFICE, INC.,

AT _____ O'CLOCK _____ M.
J. R. SCULLY, Clerk
UTICA

Plaintiffs

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Plaintiff-Intervenors,

CIVIL ACTION
NO. 76-Cv.-154

-against-

ORDER

ROBERT F. KELLY, Chairman, JERRY A. DANZIG,
Vice Chairman; MICHAEL H. PRENDERGAST; ELI
WAGER; and EDWARD J. WEGMAN, Commissioners
of the NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,

Defendant-Intervenor.

-----x
This cause coming on to be heard on the Fourteenth
day of June, 1976 on Motion of the City of New York for
leave to file a brief as amicus curiae, and the court
being fully advised having considered the motion and the
proposed brief tendered therewith, and having heard counsel
thereon and no party having raised any objection to the
granting of said Motion, and it appearing to the court that
the City of New York should be granted leave to file a brief
as amicus curiae as prayed,

IT IS ORDERED that the City of New York has leave
to file a brief as amicus curiae and the proposed brief

ORDER

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submitted with the Motion of the City of New York is hereby
accepted for consideration in this cause.

s/ Edmund Port
U.S.D.J., Sr.

Dated: June 21, 1976

NOTICE OF MOTION

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV, INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.; NATIONAL
CABLE TELEVISION ASSOCIATION, INC.;
NEW YORK STATE CABLE TELEVISION ASSOCIATION,
and HOME BOX OFFICE, INC.,

Plaintiffs,

- against -

ROBERT F. KELLY, Chairman; JERRY A. DANZIG,
Vice Chairman; MICHAEL H. PRENDERGAST; ELI
WAGER; and EDWARD J. WEGMAN, Commissioners
of the NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants,

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Intervenors.

CIVIL ACTION
No. 76-CV-154

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS TO INTERVENE AS A DEFENDANT

The National Association of Regulatory Utility Commissioners (NARUC) hereby moves the Court, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene in this cause as a party defendant to assert the defenses set forth in its proposed Answer and Defense, attached hereto, and as grounds therefor respectfully shows:

1.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the

NOTICE OF MOTION

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Virgin Islands engaged in the regulation of carriers and utilities. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains the State officials charged with the duty of regulating communication common carriers within their respective States and, as such, they have the obligation to assure the establishment and maintenance of such communications service and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable. In addition, some members of the NARUC are engaged in the regulation of cable television at the State level.

2.

This cause presents Federal questions concerning the power of the State of New York to regulate pay cable television rates, a local aspect of community antennae television systems. The final determination of this issue will constitute a judicial landmark which will, in effect, confirm or deny to every State the power to protect the public interest through effective regulation of pay cable television rates. Consequently, the members of the NARUC, as government regulators, are vitally concerned with these issues and the precedent which will be established by their resolution. Intervention in this cause is necessary to the protection of their interests.

3.

The plaintiffs have claimed in their complaint that regulation of pay cable television rates has been preempted by the Federal

NOTICE OF MOTION

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Communications Commission under the Communications Act of 1934, as amended, 47 U.S.C., §151 et seq. The NARUC seeks leave to intervene in this action to advance the position that the FCC does not have authority to preempt the States in the regulation of pay cable television rates. Therefore, the NARUC has a defense to the Complaint of Plaintiffs presenting questions of law which are common to the main action. The NARUC respectfully refers the Court to the proposed NARUC answer and defense attached hereto.

4.

The NARUC believes that, as an intervening defendant, it may be able to remind the Court of legal matters which may not be brought to its attention by the parties to this cause. In addition, the Defendants to this action are not members of the NARUC. Inasmuch as the disposition of this cause will affect the interest of the members of the NARUC as described above, intervention by the NARUC is necessary to adequately protect that interest.

5.

The intervention of the NARUC will not delay or prejudice the adjudication of the rights of the original parties. Because a hearing on Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment is presently scheduled for June 14, 1976, the NARUC is attaching hereto its proposed memorandum of law in support of Defendant's Cross-Motion for Summary Judgment. Thus, this motion and the attached submissions are being filed within ten days of the hearing date, pursuant to Rule 56(c), Federal Rules of Civil Procedure, so that no delay will be incurred by the granting of this motion to intervene.

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WHEREFORE, the NARUC respectfully moves the Court that it be granted leave to intervene in this cause as a party defendant, that it be permitted to file the Answer and Defense submitted herewith, that it be permitted to file its proposed memorandum of law in support of Defendants' Cross-Motion for Summary Judgment, and that it be granted such other and further relief as may appear just and proper.

Respectfully submitted,

PAUL RODGERS
General Counsel

STEPHEN C. KRASKIN
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

June 2, 1976

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NOTICE OF MOTION

To Counsel for the Plaintiffs and Defendants:

Please take notice that the undersigned will bring the above Motion on for hearing before the Court at the United States District Court for the Northern District of New York, United States Courthouse, Syracuse, New York, on June 14, 1976, at 10:00 A.M., or as soon thereafter as Counsel can be heard.

This, the 2nd day of June, 1976.

PAUL RODGERS
General Counsel

STEPHEN G. KRASKIN
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners,
Applicant for Intervention

1102 ICC Building
Post Office Box 684
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(202) 628-7324

June 2, 1976

ANSWER AND DEFENSE OF INTERVENOR-DEFENDANT

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV, INC.; CAPITOL
CABLEVISION, INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.; NATIONAL
CABLE TELEVISION ASSOCIATION, INC.;
NEW YORK STATE CABLE TELEVISION ASSOCIATION,
and HOME BOX OFFICE, INC.,

Plaintiffs,

- against -

ROBERT F. KELLY, Chairman; JERRY A. DANZIG,
Vice Chairman; MICHAEL H. PRENDERGAST; ELI
WAGER; and EDWARD J. WEGMAN, Commissioners
of the NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants,

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Intervenors.

CIVIL ACTION
No. 76-CV-154

NARUC ANSWER AND DEFENSE

NOW COMES THE NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, hereinafter sometimes referred to as the "NARUC,"
and files this its Answer and Defense in intervention to the
Complaint of the plaintiffs in the above actions, and shows:

First Defense

The Complaint fails to state a claim against the Defendants
upon which relief can be granted.

Second Defense

The NARUC answers the several paragraphs of the Complaint as
follows:

1. The NARUC denies the allegations contained in paragraphs 1, 2, and 3.

2. For want of sufficient information to form a belief, the NARUC is unable either to admit or deny the allegations contained in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13.

3. The NARUC denies the asserted definition of cable television systems alleged in paragraph 14 and the definition of pay cable alleged in paragraph 15.

4. The NARUC denies the allegations in paragraphs 16 and 17.

5. The NARUC admits the allegations contained in paragraph 18.

6. The NARUC denies the allegations contained in the third sentence of paragraph 19.

7. The NARUC admits that the language quoted in paragraph 20 is from the First Report and Order in Docket No. 19554, FCC 75-369, 52 F.C.C. 2d 1, 33 R.R. 2d 367 (1975), and that the language quoted in paragraph 21 is from the Notice of Inquiry in FCC Docket No. 20767 (April 2, 1976).

8. For want of sufficient information to form a belief, the NARUC is unable either to admit or deny the allegations contained in paragraphs 22 and 23.

9. The NARUC denies the allegation contained in the first sentence of paragraph 24.

10. The NARUC admits that the New York State Commission on Cable Television did issue the "Clarification of Commission Policy," Docket No. 90010, as alleged in paragraphs 24 and 27.

11. The NARUC denies the allegations contained in paragraphs 25, 26, 28, 30, 31, 34, 35, 36, 37, 38, 41, 42, 43, and 44.

ANSWER AND DEFENSE OF INTERVENOR-DEFENDANT

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WHEREFORE, the NARUC prays that the prayers of the Complaint be denied and that the Complaint be dismissed.

This, the 2nd day of June, 1976.

PAUL RODGERS
General Counsel

STEPHEN G. KRASKIN
Deputy Assistant General Counsel
National Association of
Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

June 2, 1976

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BROOKHAVEN CABLE TV INC.;
CAPITOL CABLEVISION INC.;
SAMSON CABLEVISION CORP.;
TELEPROMPTER CABLE SYSTEMS, INC.;
WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIATION,
INC.; NEW YORK STATE CABLE TELEVISION
ASSOCIATION, and HOME BOX OFFICE, INC.,

Plaintiffs

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

76-CV-154

Intervenors-Plaintiffs

-against-

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGNER; and EDWARD J.
WEGMAN, Commissioners of the NEW YORK
STATE COMMISSION ON CABLE TELEVISION,

Defendants.

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,

Intervenor-Defendant.

CITY OF NEW YORK,

Amicus Curiae.

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and

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Attorneys for Plaintiffs

STUART ROBINOWITZ, ESQ.
Of Counsel

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REX E. LEE
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KENNETH J. CONNELLY, ESQ.
Assistant Attorney General
Of Counsel

ALEXANDER GIGANTE, JR., ESQ.
EVELYN J. JUNGE, ESQ.
Of Counsel

EDMUND PORT, Judge

MEMORANDUM-DECISION AND ORDER

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The plaintiffs and defendants have both moved for summary judgment on the first claim for relief asserted in the complaint. That claim challenges the right of the defendants, Commissioners of the New York State Commission on Cable Television (State Commission), to regulate the charges for pay cable TV on the ground that the matter has been preempted by the Federal Communications Commission.

The United States and the Federal Communications Commission were granted leave to intervene as parties plaintiff. The National Association of Regulatory Utility Commissioners was granted leave to intervene as a party defendant. The intervenors have joined in the motions for summary judgment. The City of New York was granted leave to appear as amicus curiae in support of the defendants' motions.

The Parties

Five of the original plaintiffs (Brookhaven, Capitol, Samson, Teleprompter and Warner) are corporations which operate cable television systems in New York State. National Cable Television Association, Inc. (NCTA) and New York State Cable Television Association (NYCTA) are, respectively, national and state trade associations of cable television systems. The remaining plaintiff, Home Box Office (HBO), is an enterprise which supplies pay cable programming to cable television systems both in New York and in other states. Plaintiff intervenors are the United States and the Federal Communications Commission (FCC).

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The defendants are the five members of the New York State Commission on Cable Television. See N.Y. Exec. Law § 814 (McKinney Supp. 1975). Defendant intervenor, the National Association of Regulatory Utility Commissioners (NARUC), is a quasi-governmental, nonprofit organization whose membership includes governmental and regulatory bodies throughout the United States.¹

Cable and Pay Cable TV

Cable TV essentially operates by retransmitting television signals to home viewers by cable, rather than by over-the-air broadcasting. When it originated, cable TV performed two basic functions. It enhanced reception of local television broadcasts, and it also permitted the importation of signals from distant television stations beyond the range of local reception.² Today, however, cable TV systems may also originate their own programming, which is called "cablecasting"³, or may make available certain "access channels" over which individuals⁴ may transmit programming to home viewers. Generally, cable TV systems provide these services to their subscribers for a basic monthly fee.⁵

Pay cable TV augments the basic cable service by providing the home viewer with additional programming for an additional monthly or other charge. The most common pay cable system provides the viewer with an additional channel for a flat monthly fee over the basic cable TV charge. The plaintiffs employ such a system. HBO supplies box-office type programming to local cable TV systems. This programming includes recent motion pictures, sports events not

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otherwise televised, and other entertainment, all shown without commercial interruption.⁶ The local cable TV system then distributes this programming to pay cable home viewers over a channel which is accessible only to the pay cable subscribers. In order to receive HBO, the subscribers must pay a monthly fee in addition to the charge for their basic cable TV service.

Other pay cable systems are also being developed. Some systems provide the viewer with different programming options, e.g., sports programs or recent films, at different prices. Some systems charge the viewer only for those programs actually watched.⁷

The FCC's Actions

By 1965,⁸ the FCC was involved in regulating the growing cable TV industry. The agency's jurisdiction over this developing medium was first upheld by the Supreme Court in 1968.⁹ In 1969, in an effort to encourage diversity of programming on cable TV, the FCC promulgated rules requiring cable TV systems having over a minimum number of subscribers to originate their own programming through cablecasting.¹⁰ The Commission envisioned that some of this cablecasting would occur over leased access channels.¹¹ These are channels made available by the cable TV system, for a fee, to a third party who provides programming for home viewers. The FCC announced in 1971 that it had preempted the field of pay cable television cablecasting,¹² even though no comprehensive review of pay cable had yet been undertaken.

Having developed a policy of dual jurisdiction over cable TV

rate regulation, the FCC in 1972 decided to permit local regulation¹³ of the rates for basic cable TV services only. These are the services which the cable system regularly supplies to all subscribers. However, because the FCC wanted to encourage experimentation in the new medium of pay cable TV, and because it feared that both federal and local regulation would be confusing and impracticable, the Commission¹⁴ at that time precluded local rate regulation for pay cable TV. The FCC's position and its reasoning were stated much more clearly in a subsequent clarification in 1974.

It remains our intent to keep [leased access] channels as free as possible from any regulation that might restrict or artificially alter their growth. This is particularly true in the area of rate regulation. We have pre-empted this area with the explicit purpose of allowing the market place to function freely.

. . . .

We have intentionally and specifically limited rate regulation responsibilities to the area of regular subscriber service, and we will continue to do so. We have defined "regular subscriber service" as that service regularly provided to all subscribers. This would include all broadcast signal carriage and all our required access channels including origination programming. It does not include specialized programming for which a per-program or per-channel charge is made. The purpose of this rule was to clearly focus the regulatory responsibility for regular subscriber rates. It was not meant to promote rate regulation of any other kind.

85. After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development. This is precisely what we are trying to avoid.-5

Noting that conventional TV's dependence on advertising and its limited broadcast spectrum confined its programming to mass appeal, the FCC in 1975 further explicated the need for its policy.

Since conventional television often cannot, because of its nature, cater to minority tastes and interests, we encourage the development of new technologies which promise viewing diversity. Subscription television promises to bring both diversity of programming and diversity of format to those who are willing to pay a direct charge for the service. Neither STV nor cable television must attract advertiser support with programming having a broad mass appeal. Cable television, with its abundant channel capacity, is particularly able to program for audiences with specialized interests. Subscription television's potential to expand the public's program choices, to supplement the programming now provided by conventional television, gives it an important role to play in our national communications structure.¹⁶

Once again, the the spring of 1976, the FCC emphasized its position. "[T]he Commission has not only declined to regulate the rates for these services [including pay cable] but has preempted¹⁷ their regulation by state and local authorities."

The State's Actions

In 1972, the New York State Commission on Cable Television (State Commission) was created. N.Y. Exec. Law §§ 811-31 (McKinney Supp. 1975). The State Commission was given rather broad powers to regulate cable TV within New York, see e.g., Id. §§ 816, 824, including the power to regulate the rates charged by cable TV systems. Id. §§ 822, 825. Nowhere within the State Commission's enabling legislation is any distinction drawn between basic cable TV service and pay cable TV. The state statutes require that rates charged by a cable TV company be specified in the company's franchise, Id. § 825(1), and that rates not be changed except by amendment of the franchise. Id. § 825(2). Furthermore, any franchise amendment

requires the approval of the State Commission. Id. § 822(1). Thus, any change in the rates charged for cable TV service requires the State Commission's approval.

In March of 1976, the State Commission issued a Clarification of Commission Policy, Rates Charged by Cable Television Companies for "Auxilliary" Programming, Docket No. 90010 (March 1, 1976)¹⁸ (Clarification). In its Clarification, the State Commission asserted its authority to regulate the rates charged for pay cable TV. It disputed the FCC's jurisdiction over such regulation and further disputed the FCC's contention that pay cable rate regulation had, in fact, been federally preempted. The State Commission expressed concern that, due to the FCC's position, many New York cable TV companies were not complying with the requirements of the New York Executive Law. In particular, they were allegedly refusing to file their rates for pay cable TV, although they did so for basic cable TV. Many companies supposedly instituted HBO service without specifying the rates charged in their franchise. The State Commission also claimed that various abuses were occurring concerning the fees¹⁹ charged for pay cable TV.

The Clarification concluded with a specific ruling that pay cable TV services were not exempt from the requirements of Section 825 of the Executive Law. In lieu of formal amendment of their charters "at this time", the State Commission required all cable TV companies providing pay cable services to file a notice of the nature of their pay cable services along with the rates charged, or else face appropriate sanction. Finally, the State Commission states that active enforcement of all these policies will be undertaken.

Plaintiffs then commenced this action, claiming that the State's Clarification violates orders of the FCC in an area specifically preempted by the FCC. Plaintiffs request a judgment declaring the State's attempt to regulate pay cable TV void and enjoining such regulation.
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Contentions

The plaintiffs simply contend that the State Commission's Clarification constitutes price regulation of pay cable TV which has been prohibited and preempted by the FCC.

Defendants take the position that the State Commission's action does not attempt to regulate the charges for pay cable, that the FCC's action does not effect preemption, and the FCC lacks jurisdiction to preempt.

In addition, the defendants seek judgment in their favor because of an asserted lack of a case or controversy, because of mootness, and plaintiffs' lack of standing.

Because these last claims are without substance, and because the FCC has the power and has preempted the right to control pay cable charges, judgment should be granted in favor of the plaintiffs.

Issue

The real issue simmers down to: Whether jurisdiction over pay cable rates is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting"? U.S. v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

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Power to Regulate Cable TV

The FCC's authority to regulate cable TV has been upheld by the Supreme Court on two occasions. The first case arose out of an agency rule which forbade a cable TV system from importing distant television signals into any of the nation's 100 largest television markets. Southwestern Cable Company sought to bring distant (Los Angeles) signals to its cable subscribers in San Diego, one of the 100 largest markets. At the request of a third party, the FCC ordered Southwestern to halt this proposed expansion of its services. The Supreme Court upheld the Commission's authority. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The Court found this authority in the general language and purpose of the Federal Communications Act. 47 U.S.C. §§ 151, 152(a). However, without specifically detailing the limits of the FCC's power, the Court noted that such authority is "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

Four years later, the Court further illuminated the contours of its "reasonably ancillary" test. The FCC had promulgated rules requiring cable systems with a certain minimum number of subscribers to originate some programs. A cable system subject to the new rules challenged the FCC's authority to issue them, and the agency's power was again upheld. United States v. Midwest Video Corp., 406 U.S. 649 (1972). The Court's inquiry focused on whether the program-origination rules were "reasonably ancillary" to the performance of the FCC's re-

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sponsibilities for regulating TV broadcasting. Id. at 663. Holding in the affirmative, the Court noted that "the Commission's legitimate concern in the regulation of CATV [cable TV] is not limited to controlling the competitive impact CATV may have on broadcast services ..., but extends also to requiring CATV affirmatively to further statutory policies." Id. at 664.²¹ The Court also stated that, merely because the cablecasts would be transmitted without use of the broadcast spectrum, the regulation was no less ancillary to the FCC's jurisdiction over broadcast services. Id. at 669. Emphasis was placed on the rule's effect of providing home viewers with "suitably diversified programming." Id. With the distinction between protection and promotion and that between broadcasting and cablecasting set aside, the Court's inquiry became much simpler.

[T]he critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services..." (citation omitted) We find that it has.

Id. at 667-68.

Reasonably Ancillary?

The FCC has found²² that pay cable TV increases programming diversity, an objective which has specifically been held to be reasonably ancillary to the FCC's responsibilities over broadcasting. United States v. Midwest Video Corp., supra, 406 U.S. at 667-68. Pay cable TV's capability to satisfy minority tastes which are ordinarily overlooked by conventional television²³ enhances and fortifies this objective.

In furtherance of program diversification and applying the "reasonably ancillary" test, the Ninth Circuit has upheld the FCC's power to regulate access channels, including leased access channels. American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

Defendants rely heavily on National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976) (NARUC), which limited the FCC's reasonably ancillary powers. NARUC held that the FCC could not preempt state regulation of the use of cable TV leased access channels for two-way non-video communications such as surveys and burglar alarms.²⁴ The NARUC court reached its result in spite of defining "ancillary to broadcasting" broadly.

Midwest, without question, takes a giant step beyond Southwestern, in relaxing the nature of the ancillarity necessary to support an assertion of Commission power over cable. As we read the case, it turns upon a determination that "ancillary to broadcasting" means not only "for the protection of broadcasting", but also embodies any regulation of cable which in its own right serves the purposes pursued by broadcast regulation. Since a prime purpose in the area of broadcast regulation is the assurance of variety in what appears on the home viewer's screen, the Court concluded that an origination requirement aimed at providing "suitably diversified programming," is within the ancillarity standard.

Id. at 615 (footnotes omitted). NARUC concluded that non-video return signals²⁵ from the viewer to the cable TV system had no relation to the FCC's power over broadcasting. These signals were private in nature and, in fact, had nothing to do with broadcasting. The court contrasted cable programs which, to the home viewer, are indistinguishable from broadcasts, even though they are transmitted by cable and not over the air. Id. at 615-16. Although NARUC did limit the FCC's powers, that limit was placed well beyond the FCC's present attempts

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²⁶
to regulate pay cable TV.

The nexus between broadcasting purposes and "leased access channels for two-way, point-to-point, non-video communications"²⁷ which was found to be so patently missing in NARUC is obviously present in pay cable TV.

The FCC has determined that rates for pay cable TV should be set by marketplace forces and not regulated by state or local authorities. The rationale behind this decision is simply that rate regulation can be expected to chill development of the new medium, whereas a free market environment should enable it to grow. Since the FCC has also determined that pay cable TV will increase programming diversity, it follows that efforts to nurture and protect this infant medium will, likewise, result in an increase in programming variety. This same rationale supported an earlier decision of the FCC to preclude rate regulation of another infant medium, subscription television (STV).²⁸

National Association of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) (NATO). NATO upheld the FCC's jurisdiction over rate regulation for STV. More recently, the Ninth Circuit has affirmed the FCC's jurisdiction to regulate the rates for cable TV access channels, including those for leased access channels. American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

Defendants argue that rate regulation of pay cable TV transcends the limits of the FCC's "ancillary" jurisdiction. In Midwest Video, the Supreme Court upheld the FCC's cablecasting requirements by a 5-4 vote, with Chief Justice Burger casting the deciding vote. In his concurring opinion, the Chief Justice stated his belief that

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"the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (Burger, C.J., concurring). Relying on the language of the Chief Justice, defendants argue that the present attempt to rate regulate pay cable TV exceeds these "outer limits". However, if a cable TV system can be "drafted against[its] will to become a broadcaster" 406 U.S. at 680 (Douglas, J., dissenting), and still be within the "outer limits"; it is hard to see how permitting free play in the great variety of pay TV programs can be outside those limits.

Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963) and TV Pix, Inc. v. Taylor, 304 F.Supp. 459 (D. Nev. 1968), aff'd, 396 U.S. 556 (1970), cited by defendants are inapposite. On an analysis of the facts in those cases, the Court merely found that the Commission had not, in fact, exercised its power to preempt. In this case, the preemption or, as stated by the defendants' clarification, the "purported preemption of the field", is virtually conceded. The defendants, however, "fail to agree with the legality of the FCC's preemptive policy".

The state defendants argue that their actions are merely concerned with franchising. Since the power to franchise is a state power, delegable to localities, the FCC allegedly cannot preempt this area.²⁹ Defendants have overstated their case. The FCC has developed a policy of dual jurisdiction over cable TV, with responsibilities divided between the Commission and state and local govern-

ments. See National Cable Television Association v. United States, 415 U.S. 336, 339 (1974). Specifically, the FCC has concluded that local franchising of cable TV systems is preferable to a scheme of federal licensing.³⁰ Also, rate regulation of basic cable TV services has been delegated to the states.³¹ On the other hand, the FCC has consistently precluded local rate regulation of pay cable TV.³² The state defendants' present actions go beyond mere franchising; they attempt to regulate the rates charged for pay cable TV in clear conflict with federal policy. Although defendants argue that their actions are authorized by their enabling legislation, N.Y. Exec. Law §§ 811-31 (McKinney Supp. 1975), this very statute contradicts their assertion of authority independent of the FCC. One of the enumerated legislative findings therein is a need "to promote the rapid development of the cable television industry responsive to community and public interest and consonant with policies, regulations and statutes of the federal government..." Id. § 811 (emphasis added).

Ripeness, Mootness, Standing

The defendants' claims of ripeness, mootness and standing can be disposed of with little discussion.

³³
The defendants' Clarification of Commission policy makes it abundantly clear that it is the Commission's policy to require cable TV companies in New York to specify in the franchise the rates for "auxilliary programming" as well as "rates for ... regular subscriber services". The Clarification further recognizes the "growing popularity of the 'home box office' programming service". The Clarification then

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acknowledges that cable TV services have failed to file the rates for cable pay TV, a practice which was "attributable to the Federal Communications Commission's position that state and local governments may not involve themselves in the regulation of subscriber rates for cable television services other than those described above as 'regular' or 'basic'."³⁴

The Clarification then goes on to state that, because the preemption policy of the Commission has not been tested in a court, it will insist on the filing as required under its clarification.

Thus, although inviting a court test, it now, given the opportunity, seeks to avoid it.³⁵ For noncompliance, it threatens enforcement.

In short, it prefers the threat to the test.

Although it has not required the plaintiffs presently supplying pay cable TV service to amend their charter, "at this time", no assurance is given of when such amendment might be required. The necessary long term and substantial commitments required for the development of pay cable TV are not likely to be undertaken while "waiting for the other shoe to drop".

Under these circumstances, the test for ripeness is met. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

Abbott Laboratories, supra, established a two-part test for determining the ripeness of an action. The test requires the district courts to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). The factors which led the Court to find that case fit for judicial decision are all present here. First, this action involves purely

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legal questions, essentially whether the FCC has jurisdiction to preempt pay cable TV rate regulation. Secondly, the Clarification issued by the State Commission possesses the requisite finality. It is not an informal statement, nor is it the ruling of a subordinate administrative officer. Rather, it is a ruling by the five-member state commission which has jurisdiction to regulate cable TV in New York. Finally, the Clarification is effective upon publication. It demands compliance within two months, threatens sanctions, and promises active enforcement of its rulings.

The second prong of the ripeness test considers the harm caused to the plaintiffs by withholding judicial review. In Abbott Laboratories, supra, plaintiffs were forced to comply or else to face civil and criminal sanctions. Here, although the threat of sanction is not as ominous, and the required filing not as onerous, the mere issuance of the Clarification has adversely affected all plaintiffs. Because cable TV is a capital intensive enterprise, cable systems which want to begin pay cable operations have been deterred from doing so by the threat of rate regulation.³⁶ Existing pay cable systems are deterred from expanding geographically.³⁷ Also, since the issuance of the Clarification, HBO has been severely hampered in its efforts to obtain new affiliates in New York State.³⁸ These facts are unlike those in Daley v. Mathews, 536 F.2d 519 (2d Cir. 1976), where the Second Circuit recently affirmed a dismissal for want of ripeness. In contrast to the "tentative possibility of future inspection" Id. at 522, present in Daley, supra, the hardship to the plaintiffs herein is present and real.³⁹ The action is ripe for judicial review.

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Mootness

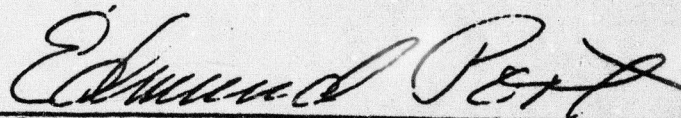
Little need be said concerning defendants' claim of mootness as to four of the plaintiff TV systems which have filed with reference to pay cable TV. No claim is made that the case has been mooted as to the fifth cable TV plaintiff. In addition, the four filing plaintiffs filed under protest. The threat of having to amend their franchises and obtain the approval of the State Commission at any time subject to sanctions for failure is bound to affect adversely the stations filing under protest.⁴⁰ As indicated previously, making long range plans is impractical while "waiting for the other shoe to drop". In addition, mootness is not raised as to the intervening plaintiffs.

Standing

Both NCTA and NYCTA, whose standing is attacked, clearly represent members adversely affected by the defendants' action. They, as well as HBO, whose pecuniary interest is clearly involved, have stand-⁴¹ing.

For the reasons herein, the motion of the plaintiffs for summary judgment on the first claim in the complaint should be granted. The plaintiffs are to prepare a judgment to be agreed upon and submitted to me for signature. If the parties are unable to agree, judgment may be settled on three days notice.

SO ORDERED.


Senior United States District Judge

Dated: March 9, 1977
Auburn, New York

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FOOTNOTES

¹ The City of New York, appearing as amicus curiae, has briefed the court in support of the defendants' position that the FCC lacks jurisdiction to preempt pay cable TV.

² See United States v. Southwestern Cable Co., 392 U.S. 157, 163 (1968).

³ See United States v. Midwest Video Corp., 406 U.S. 649 (1972).

⁴ See American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

⁵ See Affidavit of Gerald M. Levin, ¶2 (dated April 29, 1976).

⁶ Id. ¶¶3-5.

⁷ See Affidavit of James R. Hobson, ¶3 (dated June 4, 1976).

⁸ See Id. ¶7.

⁹ United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

¹⁰ See First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201 (October 20, 1969). These regulations were subsequently upheld by the Supreme Court in United States v. Midwest Video Corp., 406 U.S. 649 (1972).

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11

See First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201, 214 (October 24, 1969).

12

"[T]he Commission has pre-empted the field of pay television cablecasting so that local franchise terms are inoperative and no further affirmative authorization is required." Request by Time-Life Broadcast, Inc., 31 F.C.C. 2d 747 (September 8, 1971).

13

Cable Television Report and Order, Docket Nos. 18397 et al., 36 F.C.C. 2d 143, 209 (February 3, 1972).

14

Id. at 193.

15

Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C. 2d 175, 185, 199-200 (April 17, 1974).

16

First Report and Order in Docket Nos. 19554 and 18893, 52 F.C.C. 2d 1, 43 (April 4, 1975).

17

Notice of Inquiry in Docket No. 20767, F.C.C. 76-314, ___ F.C.C. 2d ___ (April 2, 1976) at 2.

18

The Clarification has been attached to the state defendants' motion papers. Affidavit of Kenneth J. Connolly, Exh. 1 (dated May 5, 1976).

DECISION

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19

For example, the State Commission alleges that some companies, when refused rate increases for basic cable TV services, have unilaterally raised their pay cable TV fees.

20

Plaintiffs' complaint alleges federal jurisdiction under a variety of statutes: 28 U.S.C. §§ 1331, 1337, 1343(3), 2201; 47 U.S.C. § 401(b). It seems abundantly clear that this suit arises under the Federal Communications Act, 47 U.S.C. § 151 et seq. Jurisdiction is, therefore, based on 28 U.S.C. § 1337. See *Post v. Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971). The per se interstate nature of cable TV has been noted elsewhere. *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 621 (D.C. Cir. 1976) (Lumbard, J., concurring). There is no need to consider the other alleged jurisdictional grounds.

21

In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in Southwestern was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting.

United States v. Midwest Video Corp., 406 U.S. 649, 667 (1972).

22

See note 16 and accompanying text supra.

23

Id.

24

National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 610 n. 44 (D.C. Cir. 1976) (NARUC).

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25

The court specifically limited its consideration to "non-video return transmissions", and did not consider return video signals because of the latter's present economic and technological unfeasibility. NARUC, supra, at 605 n. 1.

26

Judge Wilkey's opinion for the court ruled on an alternative ground--that these systems were really carriers and, because they were intrastate as well, they were specifically excluded from the FCC's purview by 47 U.S.C. § 152(b). However, NARUC was decided by a 2-1 vote, with Judge Lumbard of the Second Circuit concurring, and Judge Skelly Wright dissenting. Judge Lumbard's opinion deals only with the "reasonably ancillary" question and does not reach the issue raised by 47 U.S.C. § 152(b).

27

NARUC, supra, at 605.

28

STV is pay over-the-air television.

29

In support of this assertion, the state defendants cite two old Supreme Court cases. Russell v. Sebastian, 233 U.S. 195 (1914); City of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58 (1913). However, neither of these cases deal with federal pre-emption nor do they involve problems of conflicting state and federal powers. They concern the protection of property rights acquired by utility companies prior to the development of franchising systems.

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³⁰ Commission Proposals for Regulation of Cable Television, 31 F.C.C. 2d 115, 136 (August 5, 1971); see 47 C.F.R. § 76.31 (1975).

³¹ See notes 13 to 15 and accompanying text, supra.

³² Notice of Inquiry in Docket No. 20767, FCC 76-314, ___ F.C.C. 2d ___ (April 2, 1976); First Report and Order in Docket Nos. 19554 and 18893, 52 F.C.C. 2d 1 (April 4, 1975); Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C. 2d 175 (April 17, 1974); Cable Television Report and Order, Docket Nos. 18397, et al., 36 F.C.C. 2d 143 (February 3, 1972); Request by Time-Life Broadcast, Inc., 31 F.C.C. 2d 747 (September 8, 1971).

³³ See note 18 supra.

³⁴ Id.

³⁵ It should be noted that New York could have contested the FCC's preemption of pay cable TV rate regulation without forcing plaintiffs to bring this suit. The FCC's decision was reviewable in the Courts of Appeals pursuant to 28 U.S.C. § 2342.

³⁶ See Affidavit of Stuart Feldstein, ¶2 (dated June 10, 1976). See also affidavit of James R. Hobson, ¶12 (dated June 4, 1976).

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37

See Affidavit of Stuart Feldstein, ¶6 (dated June 10, 1976).

38

Affidavit of Bruce P. Sawyer, ¶4 (dated June 11, 1976).

39

Furthermore, the FCC has intervened as a party-plaintiff in this action. That agency, which was created "to make available...a rapid, efficient, Nation-wide, and world-wide wire and radio communication service", 47 U.S.C. § 151, has a very real interest in preventing New York from encroaching areas within the sphere of federal control.

40

See Begins v. Philbrook, 513 F.2d 19 (2d Cir. 1975).

41

"It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). See also *New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York*, 516 F.2d 350 (2d Cir. 1975). In fact, one of these plaintiff organizations, NCTA, has represented its members in similar federal litigation. See, e.g., *National Cable Television Association, Inc. v. United States*, 415 U.S. 336 (1974).